

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SMARTFLASH, LLC, et al.,) (
) (
Plaintiffs,) (Case No. 6:13-cv-447
v.) (TYLER, TEXAS
) (
APPLE, INC., et al.,) (December, 2014
) (9:00 a.m.
Defendants.) (

SMARTFLASH, LLC, et al.,) (
) (
Plaintiffs,) (Case No. 6:13-cv-448
v.) (TYLER, TEXAS
) (
SAMSUNG ELECTRONICS CO.,) (December 2, 2014
LTD., et al,) (9:00 a.m.
) (
Defendants.) (

UNSEALED PORTION OF DISPOSITIVE MOTIONS HEARING
BEFORE THE HONORABLE NICOLE K. MITCHELL
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: (See sign-in sheet.)

FOR THE DEFENDANTS: (See sign-in sheet.)

COURT REPORTER: JILL E. McFADDEN, CSR
Deputy Official Reporter
P.O. Box 480
Tyler, Texas 75710
(903) 530-3163
jmcfaddencsr@aol.com

(Proceedings recorded by mechanical stenography,
transcript produced on a CAT system.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

December 2, 2014

Page

Appearances	1
Hearing	3
Court Reporter's Certificate	292

1 THE COURT: Good morning. Please be
2 seated.

3 Ms. Hardwick, if you'll call the cases,
4 please.

5 COURTROOM DEPUTY: Yes, Your Honor.

6 The Court calls Civil Action Number
7 6:13-cv-447, Smartflash, LLC, et al. versus Apple, Inc.,
8 et al.

9 THE COURT: Announcements.

10 MR. CALDWELL: Good morning, Your Honor.
11 Brad Caldwell on behalf of the plaintiff Smartflash
12 entities. Depending on what comes up, we're going to
13 follow the advice of the -- at the bench bar conference
14 and allow those who -- no different issues, better that
15 others argue.

16 So there actually may be eight or nine of
17 us that argue today, and it would either by myself,
18 Mr. Austin Curry, Jason Cassady, John Summers, Chris
19 Stewart, Justin Nemunaitis or Hamad Hamad, depending on
20 what it is that comes up.

21 THE COURT: Okay.

22 MR. CALDWELL: The plaintiff is ready.
23 And with one observation, Your Honor, there is one
24 motion where the potential for sealing the courtroom is
25 an issue, and from our perspective, based on a

1 correspondence between the parties, it looks like some
2 parties on the left side of the courtroom want to just
3 blurt it out.

4 And so my request is that as to that
5 issue, which they know full well that local counsel has
6 already approached me, that maybe we could at least take
7 it up at the bench to determine as a preliminary matter
8 whether the courtroom should be sealed so that the
9 purpose of it isn't negated by just blurting something
10 out.

11 THE COURT: Okay. Why don't you-all
12 bring that up when we get there.

13 MR. CALDWELL: Thank you, Your Honor.

14 MR. GARDNER: Good morning, Your Honor,
15 Allen Gardner. And as I told Mr. Caldwell two minutes
16 ago, I have no intention -- we have no intention of
17 blurting anything out. And I told him that I would be
18 happy to talk with the Court at a mutually agreeable
19 time; so, I respectfully don't quite agree with that
20 statement.

21 Your Honor, Allen Gardner here for
22 Samsung. With me today is Mr. Charlie Verhoeven, Ms.
23 Melissa Baily, Mr. Kevin Smith, and also our client, Ms.
24 Julie Hahn, and we are ready to proceed, Your Honor.

25 THE COURT: Good morning.

1 MR. BATCHELDER: Good morning, Your
2 Honor. On behalf of defendant Apple, Inc., James
3 Batchelder. I'm here with my colleagues from Ropes &
4 Gray, Ching-Lee Fukuda --

5 THE COURT: Good morning.

6 MR. BATCHELDER: -- Kevin Post --

7 THE COURT: Good morning.

8 MR. BATCHELDER: -- Megan Raymond. And
9 Eric Albritton is also here with Apple.

10 MR. ALBRITTON: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MR. DUNWOODY: Your Honor, Wallace
13 Dunwoody here for Game Circus defendant.

14 THE COURT: Good morning.

15 MS. AINSWORTH: Good morning, Your Honor.
16 Jennifer Ainsworth for the HTC defendant and Exedea.

17 THE COURT: Good morning. Did we get
18 everyone? All right.

19 MR. POST: I think we got everybody.

20 THE COURT: Okay.

21 MR. POST: Good morning, Your Honor.
22 Kevin Post on behalf of Apple. I just wanted to let you
23 know that last night defendants and the plaintiffs
24 discussed a possible schedule to get through the
25 motions today.

1 THE COURT: Good.

2 MR. POST: So, if it suits Your Honor, we
3 would propose that we start with the 101 motion and then
4 have a -- what Mr. Cassady and I have described as a
5 block of experts.

6 The -- the plaintiffs' motion to strike
7 Mr. Wechselberger's opinions, and Mr. Becker's would
8 follow, and I think we would propose arguing those two
9 sort of in that order.

10 So, Wechselberger and Becker from
11 plaintiffs' perspective and then defendants' response,
12 and then proceed to the three defendant Daubert motions
13 in the order Jones, Wecker, then Mills.

14 Then turn to -- to plaintiff's O2 Micro
15 motion, and then turn to defendants' motion for summary
16 judgment of invalidity under the Gruse reference --
17 that's the 102-103 argument -- then take up plaintiffs'
18 motion to strike I believe the Reibstein, Ugone and
19 Napper opinions, then turn back to defendants for motion
20 for summary judgment for willfulness.

21 And there are two motions, I believe,
22 there. We would propose those get argued together just
23 for -- for efficiencies and convenience sake.

24 Then Game Circus has some -- some motions
25 that it would like to argue, that would follow, followed

1 by indefiniteness, and then the last motion would be the
2 non-infringing motions.

3 And again, those are two. We propose
4 those go together. So I think I got that right.

5 MR. CURRY: That's right, your Honor.

6 THE COURT: Sounds good.

7 All right. Then we can begin with the
8 101 motion. And I am just fine with whoever wants to
9 argue each motion. That's -- that's just fine with me,
10 so...

11 MR. VERHOEVEN: Your Honor,
12 Mr. Verhoeven. I'll be handling most of the argument
13 for the defendants on this issue. I have some slide
14 decks.

15 How many copies would y'all -- two?
16 Three? Two?

17 Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. VERHOEVEN: The first motion on tap
20 for today is based on the Supreme Court's landmark
21 decision in the Alice versus CLS Bank case, Your Honor.
22 So, the motion is for summary judgment of invalidity as
23 to all the asserted patents on the grounds that they
24 don't have eligible patent subject matter under section
25 101.

1 So, I'll start, Your Honor, with the test
2 as articulated in the landmark Alice decision, and that
3 test is to ask first, Are the claims directed to an
4 abstract idea? Yes or No.

5 If they are addressed in abstract idea,
6 then you proceed to the second step of the test which
7 is, Do the claims disclose an inventive concept that is
8 significantly more than an abstract idea?

9 If the answer to that is no, then under
10 the Alice decision the Court must find as a matter of
11 law that the patent's directed to ineligible subject
12 matter.

13 So let's dive right into it, Your Honor,
14 to the first step, Are the claims directed to an
15 abstract idea? Now, in looking at this, it's helpful, I
16 think, to look at post-Alice cases and what -- that have
17 found patent ineligibility and ask, Well, what were
18 their abstract ideas?

19 And so, on this next slide, slide 4 here,
20 we have listed three of them. The Ultramercial II case,
21 the Federal Circuit recently found that controlling
22 access to music, videos, games, et cetera, based on
23 rules related to advertising over the Internet was an
24 abstract idea that was patent ineligible.

25 In the Loyalty Conversion case recently

1 in the Eastern District of Texas, the Court found
2 exchanging loyalty award credits of different vendors so
3 that they can be used to make purchases of items offered
4 by different loyalty programs, that that method of
5 loyalty award credits over the Internet was invalid,
6 ineligible subject matter, an abstract idea.

7 And in the McRO versus Naughty Dog case,
8 the District Court found, Animating three-dimensional
9 characters using rules related to weighted morph targets
10 for lip synchronization was nothing more than an
11 ineligible abstract idea.

12 I think it particularly helpful, Your
13 Honor, to look at the Ultramercial II case which just
14 came out during the briefing in the Federal Circuit. In
15 that case, the court found, quote -- and I'm quoting
16 from 722 F.3d at page 1337 -- quote, The 545 patent
17 claims a method for distributing copyrighted products,
18 (e.g., songs, movies, books) over the Internet where the
19 consumer receives a copyrighted product for free in
20 exchange for viewing an advertisement, and the
21 advertiser pays for the copyrighted content.

22 So here you have a method of conducting
23 commerce over the Internet that's being described here
24 involving advertisers that pay in exchange for a deal.
25 The case continues at page 1349 through '50, quote, The

1 545 patent seeks to remedy problems with prior art
2 banner advertising over the Internet, such as declining
3 click-through rates, by introducing a method of product
4 distribution that forces consumers to view and possibly
5 even interact with advertisements before permitting
6 access to the desired media product.

7 So again, very similar, as we'll see, to
8 the patent at issue in this case which is directed to
9 payment and controlling access over the Internet. Very
10 similar steps.

11 In fact, if you go to the next slide,
12 this is a -- was quoted in the Federal Circuit at page
13 1352, and you can see it's a very detailed flow chart of
14 process steps that take place in order to facilitate
15 controlling access to music, videos, games, et cetera.
16 The facilitator transmits an ad, consumer views the ad.
17 There's a question whether the ad's interactive or not.

18 If it is, one thing happens; if not,
19 another thing happens. Responses are received. They're
20 sent back and forth across the Internet.

21 But yet the Federal Circuit said this:
22 We take out of that the abstract idea of this commerce
23 that's happening over the Internet, and that is a -- a
24 fundamental building block. It's just an abstract idea.
25 And unless there's something more, it's not going to be

1 patentable.

2 This quote from Ultra -- Ultramercial II,
3 I -- I think, Your Honor is -- describing that very
4 figure, I think, is helpful for the Court's
5 consideration. The Federal Circuit said, This ordered
6 combination of steps recites an abstraction, dash, an
7 idea, having no particular concrete or tangible form.

8 The process of receiving copyrighted
9 media, selecting an ad, offering the media in exchange
10 for watching the selected ad, displaying the ad,
11 allowing the consumer access to the media and receiving
12 payment from the sponsor of the ad all describe an
13 abstract idea. Well, I would submit, Your Honor, the
14 same is true here.

15 Now, let's turn to some examples of the
16 claims from the patents in this case. Now there's
17 multiple patents and multiple claims, but they all --
18 we're down to the same specification, Your Honor. And
19 we submit if you look at the claims, you'll find they
20 are all directed to the abstract idea of payment and
21 control for access.

22 So, this is an example of a claim that's
23 particularly egregious in terms of 101. Claim 18 of the
24 '317 patent, as you can see, this is directed to
25 payment. And all the -- all the entire claim -- claims

1 is -- is abstract idea. A method of providing data to a
2 data requester comprising; receiving a request for data
3 from the requester; receiving payment for the item.

4 It says, receiving payment data from the
5 requester relating to payment. Transmitting the
6 requested data, providing the item. And then
7 distributing payment. Reading the payment distribution
8 information from a data store; and outputting payment
9 data to a payment system for distributing payment to the
10 requested data.

11 Now, this is clearly -- if you -- if you
12 look at the precedent that we've seen with Alice in
13 Ultramercial II, an abstract idea that is -- that under
14 the first step under Alice is patent ineligible.
15 There's an exception to what's patent eligible.

16 If you look at Claim 31 of the '598
17 patent, here's a -- here's a particular egregious
18 example of abstract idea claiming the control of access,
19 Your Honor. And this is slide 13 in the -- in the deck
20 here.

21 A method of controlling access to content
22 data, the method comprising. Receiving a data access
23 request from a user for a content date. Reading rules
24 for providing access to the item. It says, Reading the
25 use data status in one or more rules. Evaluating the --

1 whether the rules for access are met.

2 The claim says, Evaluating the use
3 status data using one or more rules to determine
4 whether access to the content data item is permitted.

5 And then enabling access, providing
6 access if it is permitted. This is basic commerce.
7 This is not anything inventive, Your Honor.

8 Controlling access and distributing
9 payment has been around for ages. In fact, as we put
10 in our briefs at page 4 through 5 in our initial
11 motion, these concepts are involved as far back as the
12 1600s with toll roads.

13 Real property in the 1600s, paying a
14 fee or bartering service for access to land.
15 Libraries are a good example, paying a fee to rent a
16 book. With alcohol in the 1800s requiring proof of
17 age before serving alcohol. In airports, requiring
18 compliance with security rules before permitting
19 access. Blockbuster paying a variable fee to rent a
20 video. These are all based -- this -- this sort of
21 payment and access, these abstract ideas, are basic
22 building blocks of commerce.

23 As I showed back -- pointing back to
24 what I showed before -- this is on slide 19 -- the
25 Ultramerical II case found that part of the abstract

1 idea that was patent ineligible was just that, paying
2 for -- the advertising paying for the copyrighted
3 content before permitting access to the desired media.

4 So Ultramercial II is directly on
5 point. And it really can't be argued, Your Honor,
6 that the first step of this patent -- when you're
7 looking at these patents, does result in the
8 conclusion that the patents are claiming an abstract
9 idea of payment and access.

10 So then let's go to the second step.
11 Given that payment and access is an abstract idea, Do
12 the claims disclose an inventive concept that is
13 significantly more than an abstract idea?

14 As Your Honor's aware, merely requiring
15 generic computer implementation fails to transform an
16 abstract idea into a patent-eligible invention.

17 In the buySAFE case, it says, A claim
18 directed to an abstract idea does not move into
19 section 101 eligibility territory by merely requiring
20 generic computer implementation.

21 And again, the Loyalty. The mere
22 recitation of a generic computer cannot transform a
23 patent-ineligible abstract idea into an invention.

24 And Ultramercial, Adding routine
25 additional steps such as updating an activity log,

1 requiring a request from a consumer to view the ad,
2 restrictions on public access, and use of the Internet
3 does not transform an otherwise abstract idea into
4 patent-eligible subject matter.

5 Well, that's what we have here as I'll
6 show, Your Honor. Just as in Ultramerical II, all we
7 have in addition to the abstract concept is the
8 addition of routine steps like updating logs and
9 checking rules, and we'll see that as we go through.

10 But one more quote from Ultramerical
11 since it's directly on point, Your Honor. Referring
12 to this very chart, this detailed flow chart,
13 Ultramercial says, The claimed sequence of steps
14 compromises only conventional steps, specified at a
15 high level of generality, which is insufficient to
16 supply an inventive concept.

17 Well, I would submit that patent had
18 more detail in its steps than the specifications in
19 these patents. Alice also said electric
20 recordkeeping, obtaining data, adjusting account
21 balances, issuing automated instructions. These are
22 all things that are not inventive in step two.

23 You can't point to those basic things
24 in step two and say, Well, that's an invention.

25 So, we have a -- is this it here?

1 MS. BAILY: Yeah.

2 MR. VERHOEVEN: Your Honor, we're going
3 to go through, with your permission, an exemplary claim
4 and show -- and go through element by element.

5 As you know from Alice and Ultramercial
6 II, when you do step two, you're supposed to look at the
7 claim element by element and as a whole. And so we're
8 going to do that in one claim.

9 There's been a contention in the
10 opposition and sur-replies -- there's been argument that
11 we didn't -- we should have done element by element for
12 every single claim in our brief.

13 Well, we didn't have page space to do
14 that, Your Honor, but we did provide -- create for the
15 Court's convenience -- and we'll give a copy to the
16 other side -- this very analysis I'm going to show you
17 for every single claim that's asserted.

18 THE COURT: And it is your contention
19 that all of the asserted claims are directed at an
20 abstract idea?

21 MR. VERHOEVEN: Yes, Your Honor.

22 THE COURT: Okay.

23 MR. VERHOEVEN: So, now just using Claim
24 11 as an example, if you look at the structure of this
25 you can see that there's device elements and then

1 there's software elements that are claimed together.

2 And so the claim says, A data access
3 device for retrieving stored data from a data carrier.

4 And the first hard -- hardware element is a user
5 interface. Well, we all know that a user interface is a
6 generic computer hardware, and so we cited Loyalty in
7 support of that.

8 Claims involving that element have been
9 invalidated. A data carrier interface. Similarly, Your
10 Honor, this is a very common component that has been
11 found not to be inventive.

12 We cite the Open Text case there.
13 Storage, a program -- program store for storing code is
14 generic computer hardware. Alice itself had data
15 storage elements in it and was -- the patent found -- or
16 the court found the patent was -- didn't meet step two.

17 And then a processor. Well, you can't
18 get more generic than just a processor, and several
19 courts have found that claims reciting processor does
20 claim anything inventive.

21 So, we've got -- we've got an interface,
22 couple of interfaces, storage, and a processor. That's
23 all that's claimed in the hardware, Your Honor.

24 Okay. Let's see what's claimed in the
25 software.

1 THE COURT: Well, before you get there, I
2 mean, I understand that you've gone through and shown
3 that each of -- or you're electing that each of -- each
4 of these pieces of hardware is generic, but aren't you
5 missing the point that they are configured in a
6 non-generic way? I mean, aren't you kind of just trying
7 to strip that away and get to the abstract behind this
8 hardware theory?

9 MR. VERHOEVEN: No, Your Honor. In fact,
10 as I quoted from Ultramercial, Your Honor --

11 If we could go back to slide 24.

12 Actually, I'm going to go -- if you look
13 at this figure here, Figure 2, and -- and the quote
14 there, The claimed sequence of steps comprises only
15 conventional steps, which are insufficient to supply an
16 inventive concept.

17 And the Ultramercial says adding routine
18 additional steps does not take you out of inventive.
19 So, when you're talking about your question, the
20 specific configuration, this is what the court is
21 saying.

22 You know, you can't say, well, we've got
23 a bunch of steps configured a specific way. And if you
24 read the -- read Ultramercial and read Alice, it says
25 exactly that. That does not take you out of patent

1 eligibility, otherwise you could always say that. And
2 that's very clear in Ultramercial and in Alice, Your
3 Honor.

4 Can we go back to 31.

5 But in any event, even looking at this
6 claim, Your Honor, a user interface, data carrier,
7 storage, and a processor is not something that's
8 configured in any way that's special. Those are basic
9 components. You're just -- you're not describing
10 anything at that point. Those are basic components of a
11 communication system.

12 So then what else is claimed? Well, all
13 else that's claimed in Claim 11 are code to, code to.
14 And then functions. So we have code to retrieve use
15 status data indicating use status of data stored in the
16 carrier.

17 We just saw Ultramercial and Alice say
18 use status data -- updating use status data is not
19 something that takes you out of inventiveness.

20 Here we cite Planet Bingo for claims
21 reciting a program for retrieving various types of
22 information. So retrieving information does not take
23 you out of inventiveness.

24 The next section, code to evaluate use
25 status data using rules to determine whether access is

1 permitted. So, all this is stating is it's not -- is a
2 function. It's a step in a business method. You're
3 evaluating use status data, using use rules.

4 And as one example, the SmartGene case,
5 Claims reciting a computing device comprising rules for
6 evaluating data have been invalidated.

7 The next step, code to access the stored
8 data when access is permitted. That's just describing
9 the functional step of access. It doesn't describe
10 anything inventive.

11 Accessing stored data is something that's
12 common across all computer applications, and we've cited
13 Loyalty Conversion for the proposition that claims
14 reciting program instructions to enable access to the
15 loyalty program accounts are not inventive.

16 And then the last element, wherein said
17 rules -- excuse me -- wherein said use rules permit
18 partial use of a data item stored on the carrier and
19 further comprising code to write partial use status data
20 to the carrier when only part of a stored data has been
21 accessed. Again, these are just use rules.

22 Claims reciting receiving at least two
23 rules having certain characteristics have been
24 invalidated. Walker Digital is one example of several.

25 Alice says, Your Honor, at page 2358,

1 Given the ubiquity of computers, wholly generic computer
2 implementation is not generally the sort of additional
3 feature that provides any practical assurance that the
4 process is more than a drafting effort designed to
5 monopolize the abstract idea itself.

6 It's notable here, Your Honor, that the
7 claimed inventor of the asserted patents does not even
8 know how to write code. So, you if you can't write
9 code, the most you can do when he's claiming these
10 things is claim functions. You can't even implement
11 those functions.

12 This is exactly the type of situation
13 Alice is telling the district courts, Watch out for.
14 We've got a guy who can't even write code, and he's got
15 an idea and he's trying to patent the idea. He can't
16 even implement the idea, Your Honor. This is what Alice
17 directs district courts to be suspicious of so that the
18 drafting function doesn't get around 101. That's why we
19 have this new test with Alice.

20 If you look at the patents, every piece
21 of hardware and every asserted claim is generic and
22 known. We've listed them here. I'm not going to go
23 through all of them, Your Honor.

24 Indeed, even in the -- in the patent
25 specification itself, it says -- and this is at column

1 12, lines 38 through 41 -- the physical embodiment of
2 the system is not critical and a skilled person will
3 understand that the terminals, data processing systems
4 and the like can all take a variety of forms.

5 They're even saying this is generic
6 hardware, and the functions are just functions. The
7 inventor can't even write code. Couldn't be anything
8 more than functions.

9 But let's look at the software. Every
10 single software function claimed as well, Your Honor, is
11 simply a generic computer function.

12 Receiving, reading, evaluating,
13 displaying, forwarding, retrieving, writing,
14 transmitting, outputting, these are all basic computer
15 functions, Your Honor.

16 And the only thing that brings anything
17 out of those is the abstract idea of controlling access
18 to payment. Everything else for the implementation of
19 it, Your Honor, is completely pedestrian. There's
20 absolutely nothing novel about it.

21 If we go to the next slide.

22 The buySAFE case versus Google, Federal
23 Circuit 2014, says at page 1355, The claims' invocation
24 of computers adds no incentive concept - indeed, quite
25 limited. A computer receives a request for a guarantee

1 and transmits an offer of guarantee in return.

2 There's no further detail. That a
3 computer receives and sends information over a network
4 is not even arguably inventive.

5 And then in the Loyalty Conversion case,
6 Loyalty argues that the computer referenced in its
7 claims is not a generic computer, but instead is a
8 special purpose computer able to grant loyalty points to
9 members of the loyalty program of the commerce partner
10 and able to redeem customer possessed loyalty points for
11 goods or services that the commerce partner provides.

12 That is an accurate description of the
13 functions of the claimed computer performs. The problem
14 for Loyalty, however, is that all of those functions
15 consist of simple forms of data recording, storage, and
16 calculation, all of which are conventional functions
17 that can be performed by a generic computer or
18 improvement in the operation of the computer itself.

19 Loyalty Conversion Systems, Eastern
20 District of Texas, September 3, 2014, directly on point.
21 All we're doing in this case are simple forms of data
22 recording, payment, checking, rules. There's nothing
23 sophisticated going on in these functions, Your Honor.

24 If you look at our -- these claims, you
25 look at the arguments that you hear the defendants

1 making about, well, it's a special argument of steps and
2 whatnot, then go look at how these cases are coming
3 down. They're rejecting those arguments, Your Honor,
4 every single one of them.

5 One final thing I'll do before I conclude
6 on step two is compare our claims to the claim in Alice.
7 But I'm going to address this briefly, Your Honor,
8 because what we did is we put this chart -- didn't have
9 the color coding -- but we put the chart in our brief,
10 and in the sur-reply received some criticism saying,
11 Well, we've put in brackets there and so therefore we're
12 somehow mis -- being misleading in this chart.

13 So, I think we should just take the
14 brackets out and take a look at it, Your Honor. This is
15 comparing where we took an example claim, Claim 11 of
16 the '458 patent, against claim 26, which is the claim
17 invalidated in Alice.

18 So, here is the full text of both claims,
19 Your Honor, and I'm not going to read it all. It's here
20 in the slide for you to review. But you'll see they
21 both are divided by having hardware steps to begin with
22 and then that hardware is configured with supposed
23 software that is simply function steps. Code steps that
24 are just function steps.

25 This is exactly the structure of the

1 claims in our case, too, that have hardware elements
2 that are nothing but basic things like user interfaces
3 and storage, and then there's software elements are just
4 basic process steps with -- that are performed by
5 generic computer hardware and software. They're no more
6 than function steps.

7 So, if you look at the top, now we've
8 pulled out the hardware elements, comparing them.
9 Communication controllers. A device that's coupled to
10 the controller, data storage, computer coupled to the
11 data storage. That's Claim 26.

12 Claim 11, a user interface, data carrier,
13 storage. A processor that's coupled to those things.
14 Very similar claiming of basic generic computer
15 hardware.

16 And then if you look at the software
17 claims, you'll see very similarly what we're doing is
18 they're just reciting software functionality. So Claim
19 26 in Alice, the software -- or the devices are
20 configured to receive a transaction. Electronically
21 adjust said first account, and it goes on.

22 Insuring that a first party have adequate
23 value. Generating an instruction to said first exchange
24 institution to make an adjustment in account. These are
25 all basic business functionality. They're carried out

1 by basic software.

2 If you look at Claim 11 of '458, it's a
3 similar sort of thing. Code to receive use status data.
4 Code to evaluate use status data. To determine whether
5 access is permitted. A code to access the storage data
6 when access is permitted. So basic software functions.

7 And similarly, final point here is they
8 both also recite rules and using the rules to decide
9 whether access is allowed or not. So, when you look at
10 the claims, Your Honor, and compare them to the claims
11 that have already been invalidated in Ultramercial and
12 Alice, you see that there's a high similarity.

13 Very briefly, I'd like to show you
14 also -- it doesn't compare one for one exactly, but it's
15 also illuminating to look at Claim 2 that was
16 invalidated by the Federal Circuit in Ultramercial and
17 compare it to an example claim in our case.

18 So, taking Claim 18 of the '317 patent
19 against Claim 2, we see that they both recite a method
20 of providing data items to consumers.

21 You can pull that out.

22 They both recite receiving a request from
23 the consumer, requesting access to the data. That's the
24 little red there. It's behind it. And we can pull it
25 out so you can read it better, but they're both talking

1 about receiving or request for data. They both recite
2 receiving payment for data. And it's up there on the
3 red on the left, and down below the pull-out on the red
4 on the right.

5 And the next slide just pulls that out so
6 you can read it. You can see they both recite receiving
7 payment data. They both recite transmitting or allowing
8 access to data as a function step. And that's in the
9 red there, and we'll pull it out here.

10 Transmitting the requested data to the
11 requester. Allowing said consumer access to said media
12 product. And they both recite steps to distribute
13 payment to the content provider.

14 So those I've highlighted in that red on
15 this slide, Your Honor, and then I'm pulling it out
16 here. So, reading payment distribution information from
17 a data store, outputting payment data in Claim 18.
18 Claim 2, paying royalties to the content provider.

19 So, when you look at the claims here at
20 these patents and compare them to the claims that are
21 invalidated both in Alice and in Ultramercial II, Your
22 Honor, you see that they are remarkably similar and that
23 the methodology used by the United States Supreme Court
24 and the Federal Circuit applies equally to the patent
25 family in this case.

1 So, in summary, are the claims
2 directed -- are directed to an abstract idea? Yes, they
3 are.

4 Access to content and payment. Do the
5 claims contain inventive concept that is significantly
6 more? No. They just claim hardware elements. They're
7 generic and basic function process steps in the software
8 claims.

9 Now, briefly, I'm going to skip some of
10 these slides in the interest of time and maybe I'll come
11 back in rebuttal, but I want to address some of
12 Smartflash's arguments, if I may, Your Honor.

13 I think it's interesting to note at the
14 outset, Your Honor, that in Smartflash's opposition,
15 they -- they characterize their claims very similarly in
16 terms of what is it -- whether there's an abstract idea.

17 They say, The asserted claims are
18 directed at devices configured to digitally execute
19 payment and control access to digital content in new,
20 novel, and useful ways.

21 And it's almost the same as what we claim
22 it is, the abstract idea of the concept of payment for
23 something and controlling access to something. The only
24 thing they're doing is they're making into a specific
25 field devices configured to digitally access content.

1 And as we know from the Federal Circuit
2 precedent, limiting your abstract idea to a particular
3 field does not make it patent eligible. In their
4 briefs, they say, well, there's something more than just
5 those things. Our concept is also whether access is
6 permitted to content already in the possession of the
7 device owner and that makes our -- takes us -- our
8 concept out of being patent-ineligible abstract idea.

9 Well, we disagree. Here's some examples
10 of exactly that functionality. Lock boxes. Well, you
11 have your content in the box. You need a code required
12 to access the contents.

13 Arcade games. You want to play the game,
14 you have to put in a token.

15 Gun trigger locks. You already have the
16 gun. You already have the ammo. You need a key or code
17 required to enable a shot.

18 Child proof medicine caps. Well, you
19 already have the medicine, but you need some code or
20 some key, but in this case, you need to know how to open
21 the child-proof top in order to gain access.

22 Barbecue. You have these new barbecue
23 lighters. You can't just click the thing on. You have
24 to open a safety. You already have everything you want,
25 but you can't get access to it.

1 Pre-paid phone cards. I can go on and on
2 and on, Your Honor. This sort of functionality does not
3 take it out of being patent-eligible.

4 THE COURT: Is the non-volatile memory
5 that was referenced in there -- I mean, is that generic
6 hardware? What is that?

7 MR. VERHOEVEN: Absolutely. Non-volatile
8 memory -- there's two types of memory generally. I'm
9 being generic here, but there's volatile and
10 non-volatile. Right? Non-volatile is memory that when
11 you turn your computer off, it still stays there; and
12 when you turn it back on, it's still there.

13 Volatile is like RAM, and when you turn
14 off your computer, it's gone. This is basic memory.
15 It's nothing new there. It's -- I've seen those phrases
16 used over and over in literally hundreds of different
17 patents, Your Honor.

18 I'm not going to read all of this, Your
19 Honor, because in the interest of time. But in their
20 brief, at page 7, they list other -- take other stabs at
21 describing what their abstract idea is and it's almost
22 basically the same re -- re-packagings of the same
23 abstract idea.

24 Paying for content, selecting and paying
25 content, updating access rule, providing data with

1 purchase content, controlling access. All of that -- as
2 I've cited already, because I'm not going to re-read
3 is -- is expressly found not to be inventive by Loyalty,
4 by Amdocs, which we cited, Alice, Ultra -- Ultramercial
5 II. We can go on and on.

6 In its opposition, Smartflash argues the
7 claims are directed to something computer-specific, but
8 Ultramercial II invalidated claims exactly like that
9 that were tied to general purpose computer. And Alice
10 invalidated claims that required the use of a computer,
11 so that argument is unavailing.

12 In its sur-reply -- and I'll try to be
13 brief on this, Your Honor -- Smartflash argues that its
14 invention is -- it sort of characterizes it a little
15 differently, and it repeatedly says its invention is
16 storing two types of memory -- or two types of
17 information on memory.

18 And I'm not going to read all these in
19 the interest of time, but there's -- one, two, three,
20 four, five, six, seven, eight -- nine times they say
21 that in their sur-reply, so they're taking another stab
22 at recharacterizing what it is their abstract idea is.

23 Storing two types of information on
24 memory is exactly part of the abstract idea invalidated
25 by the Supreme Court in Alice.

1 And here we have Claim 26. It says, a
2 data storage unit having stored therein; (a) information
3 about a first count; and (b) information about a third
4 account. Well, that's two types of data, so that
5 argument is unavailing.

6 Very briefly -- if Your Honor wants me to
7 move on, I will --

8 THE COURT: Well, you've just been going
9 about 30 minutes and we have a lot of ground to cover
10 this morning, so --

11 MR. VERHOEVEN: Well, we -- our intention
12 was to be much more brief on some of the later motions.
13 We may even submit those on papers if we need to.

14 THE COURT: Okay.

15 MR. VERHOEVEN: We consider this our most
16 important motion because --

17 THE COURT: Well, then I want to give you
18 the time that -- I want to give you the time that you
19 have, so...

20 MR. VERHOEVEN: I'll be very brief. I'll
21 try to be very brief. I won't be very brief. I'll try
22 to be brief. In its opposition, Smartflash cites 11
23 cases; 10 of those cases are pre-Alice. I think that's
24 telling, Your Honor.

25 They cite TQP Development versus Intuit,

1 which is a Judge Bryson case. TQP predates Alice. What
2 they don't cite is Loyalty. Loyalty Conversion is a
3 Bryson case. It goes the other way and that's a
4 post-Alice case. I think that's telling, Your Honor.

5 They cite Ultramercial in their opening
6 brief saying, Nothing in Alice is inconsistent with or
7 overrules Ultramercial and it remains persuasive
8 authority of the Federal Circuit's view of this murky,
9 developing area of the law. That's when the Federal
10 Circuit had found Ultramercial I and found it was patent
11 eligible.

12 And then right after they said that, the
13 Federal Circuit came out and rejected that very
14 proposition, Your Honor, and found that in Ultramercial
15 II -- that in light of Alice, that Ultramercial does not
16 have patent-eligible claims.

17 And, the claimed sequence of steps are
18 only conventional, specified at a high level of
19 generality. So that's telling, Your Honor.

20 Then in their sur-reply, they switch
21 completely their strategies and they don't rely on any
22 of that. They don't even talk about Alice. They don't
23 even talk about -- well, they talk a little bit about
24 Ultramercial II, but they rely primarily on Diamond
25 versus Diehr, 1981 case, Your Honor. The -- it's way

1 before Alice.

2 And it might be useful for some side
3 point, but the question for Your Honor is we have a
4 landmark decision that's changed the law and how does
5 that affect things, and they just put their head in the
6 sand in their sur-reply about Alice and they talk about
7 Diehr.

8 Well, very briefly, Diehr was a process
9 for molding raw, uncured synthetic rubber into cured
10 precision products. This is not an abstract idea over
11 the Internet in a way to conduct commerce. In Diehr,
12 the Supreme Court says, We think that a physical and
13 chemical process for molding precision synthetic rubber
14 products...

15 That's what they're talking about.
16 Transformation -- physical transformation of an article,
17 in this case, raw uncured synthetic rubber, into a
18 different state or thing is an industrial process is
19 what the court found. That is not at all comparable to
20 our patents here. And, obviously, Alice is much more
21 comparable.

22 I think I just stated that, so I won't
23 repeat what's on this slide.

24 The other point I'd like to make, though,
25 Your Honor, is in Diehr there was no dispute that an

1 inventive concept was claimed, which is not the case
2 here.

3 Just editing myself, Your Honor.

4 All right. If we go to slide 81.

5 I'm going to do this very briefly, Your
6 Honor, but to be complete --

7 MS. BAILY: I'm really sorry to
8 interrupt. In this section of patent preemption, there
9 is one word in the corner of one slide that I think
10 Smartflash contends we have to seal the courtroom to --
11 and I just realized that right now.

12 THE COURT: Why don't y'all confer about
13 that real quick.

14 MR. VERHOEVEN: I might be able to skip
15 it in the interest of time, Your Honor.

16 THE COURT: Okay.

17 MR. VERHOEVEN: Your Honor, can we do it
18 this way, can I just have you look at it? And we won't
19 put it on the screen and we won't mention the word.

20 THE COURT: That's fine with me.

21 Is that fine with plaintiffs?

22 MR. CALDWELL: That's fine. Sure.

23 THE COURT: Okay.

24 MR. VERHOEVEN: Can you make sure
25 Mr. Fisher knows the number of the slide so we don't

1 accidentally put it up?

2 MS. BAILY: It's 84.

3 MR. CALDWELL: And so, Your Honor, our
4 request about that is -- also applies to the slides
5 because we don't know who they're passing them out to.

6 And there's been some correspondence by
7 the parties that they want to actually take this
8 information and hand it to third parties. They actively
9 want to do that.

10 So, just for clarity, I'm certainly fine
11 with the procedure for in the courtroom, but I think
12 there also needs to be clarity. They understand we've
13 designated that attorney eyes only - confidential, and
14 the fact they put it on the slide doesn't mean that
15 after this hearing they can go start passing out the
16 slides, and I think that ought to be clarified.

17 MR. GARDNER: Your Honor, this is really
18 a motion for protective order that they never filed, and
19 this is a much bigger issue than they're making it out
20 to be, and I really do -- I really would like to talk to
21 the Court about it.

22 Obviously, if they want to make this
23 position, you know, that's fine. But they threatened me
24 this morning with a violation of protective order. They
25 threatened all of us.

1 THE COURT: Why don't y'all approach.

2 MR. GARDNER: Yes, Your Honor.

3 (Sealed portion of transcript.)

4

5

6

7

8

9 (Open court:)

10 UNIDENTIFIED SPEAKER: I'm sorry to
11 interrupt, Your Honor. I can hear everything back here.

12 THE COURT: Hmm... My mic is off. Thank
13 you.

14 MR. CALDWELL: Mr. Gardner is just
15 talking loud, I think.

16 THE COURT: He seems to be talking
17 quietly. You guys be real quiet.

18 MR. VERHOEVEN: Write down the word you
19 need.

20 MR. GARDNER: I'm likely going to get a
21 protective order sanctions motion in about five minutes.

22 (Sealed portion of transcript.)

23

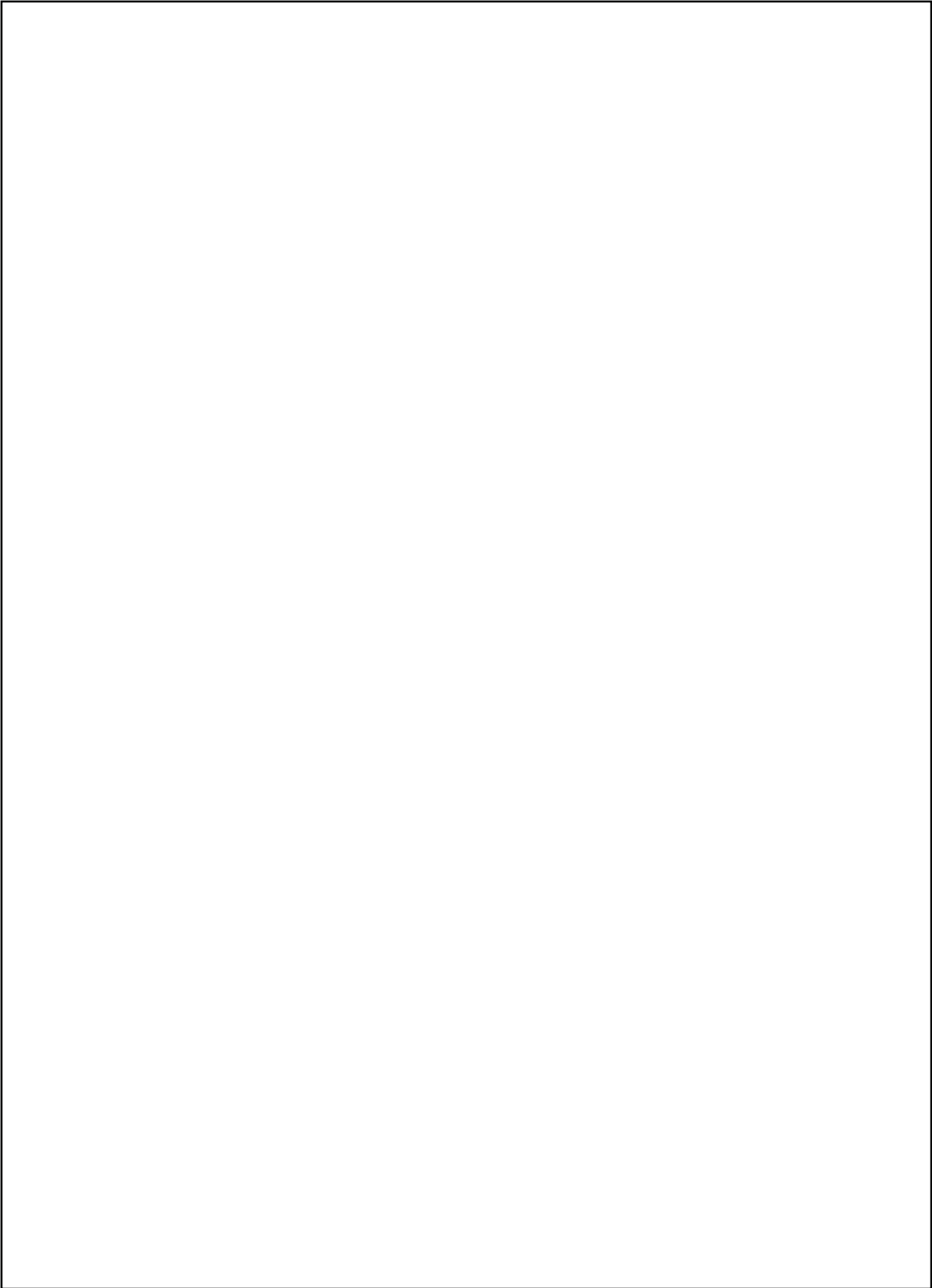
24

25

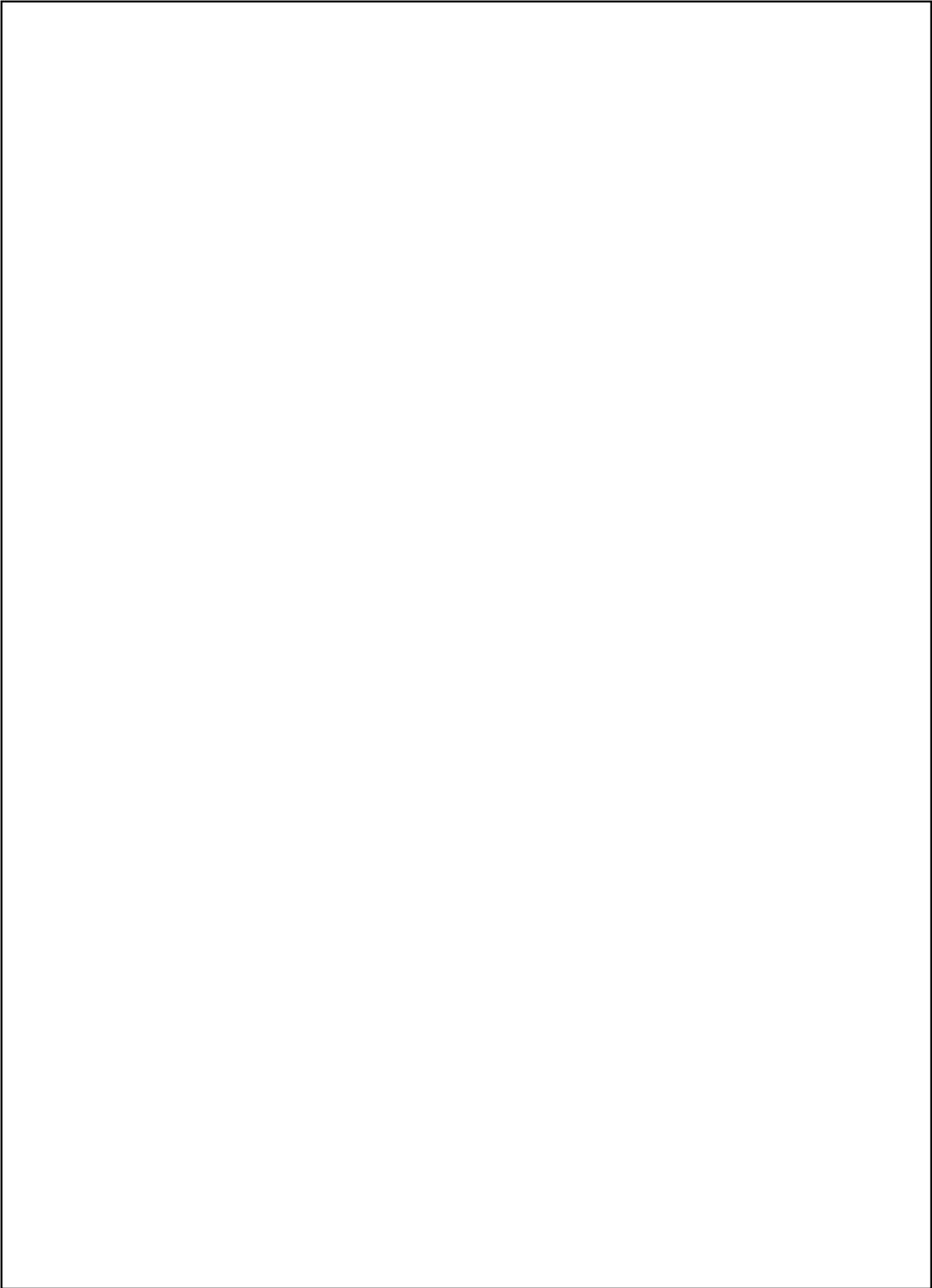
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Jill E. McFadden, CSR

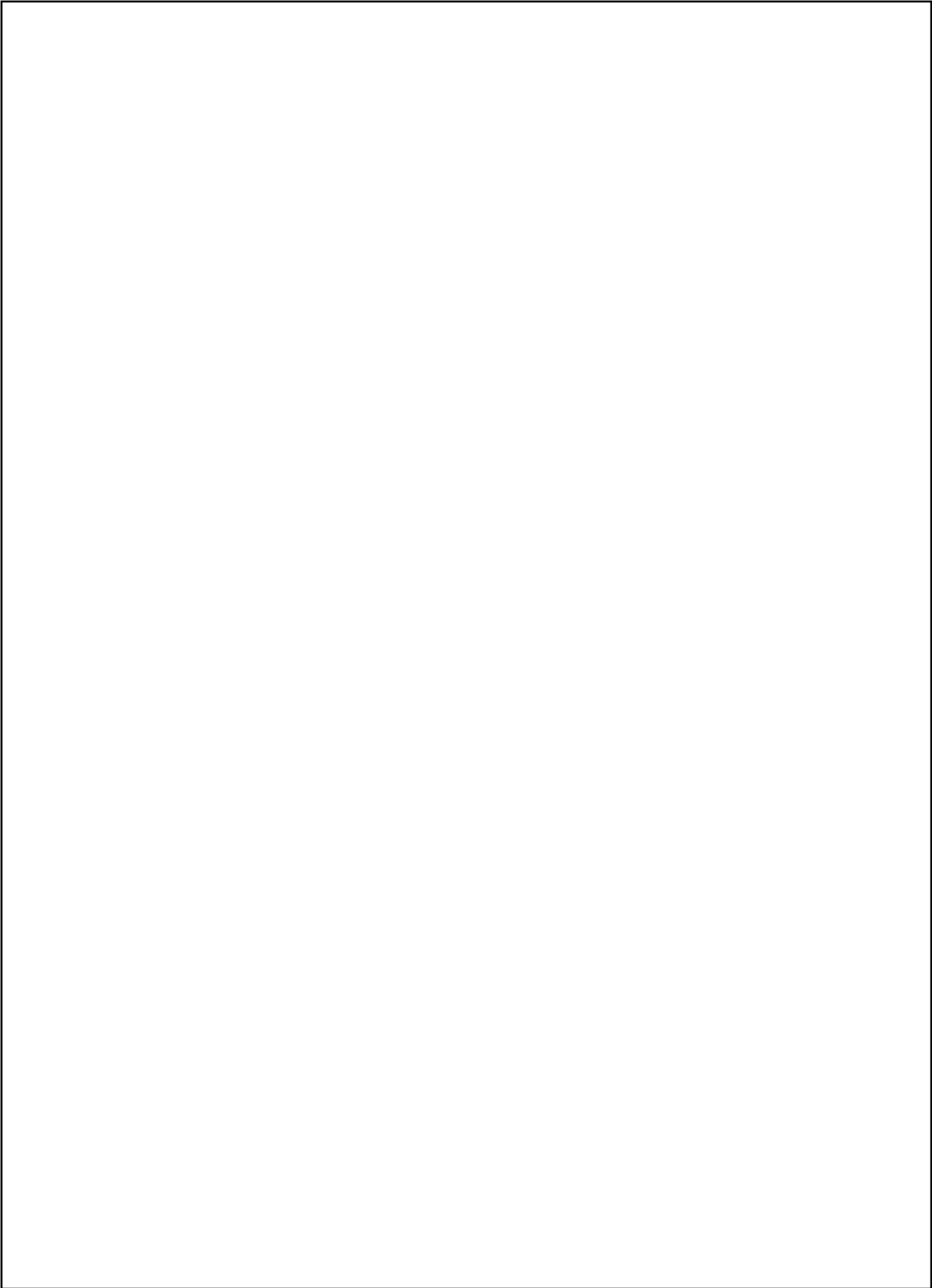
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19 (End of sealed portion.)

20 THE COURT: All right. So, Mr.

21 Verhoeven, we're going to not show that slide and

22 continue on with this 101 argument?

23 MR. VERHOEVEN: Yes, Your Honor.

24 THE COURT: Okay.

25 MR. VERHOEVEN: I'd like to briefly

1 address two other points and then I'll sit down. First,
2 there is a preemption inquiry that's also involved in
3 this whole analysis. It's not the specific Ellis test,
4 but it's something that the courts talk about as being a
5 concern under 101.

6 And the second point is, very briefly,
7 the machine transformation test is questionable, is --
8 is not controlling now but courts look at it -- still
9 consider it as well.

10 So, very briefly, on the preemption
11 inquiry -- and this is very important, and I'm citing to
12 the United States Supreme Court -- the underlying
13 functional concern here is a relative one how much
14 future innovation is foreclosed relative to the
15 contribution of the inventor.

16 That is stated recently by the United
17 States Supreme Court what the relevant inquiry is. It's
18 a relative one. And the reason I stress this, Your
19 Honor, is throughout the briefing, plaintiff misstates
20 the test suggesting that you have to preempt an entire
21 field. That is not the test.

22 In Loyalty -- I'm on slide 83 now --
23 says, These patents like other similar business methods
24 have the potential to foreclose future information
25 disproportionately relative to the contribution of the

1 inventor.

2 That, again, is the test from Mayo. And
3 so the next slide I think is the one I can't show.

4 Is that right?

5 MS. BAILY: Yes.

6 MR. VERHOEVEN: So I direct Your Honor to
7 the next slide, slide 84.

8 MS. BAILY: Slide 85.

9 MR. VERHOEVEN: Or 85. You can turn off
10 the screen.

11 MS. BAILY: Oh, sorry.

12 MR. VERHOEVEN: I'm directing the Court
13 to it.

14 Thank you.

15 MS. BAILY: Sorry.

16 MR. VERHOEVEN: I think the Court is
17 still allowed to look at it.

18 All you need to do, really, to do a check
19 on this preemption issue is look at the accused
20 products. I mean, Smartflash has accused every phone,
21 tablet, and app regardless of information.

22 And I'm not going to read it all out, but
23 if you look at the chart, then this is Exhibit B and
24 Exhibit A, and we've pulled it out and summarized. You
25 can see the vast swath of different products regardless

1 of how they're implemented across different systems that
2 are being accused in this case, across multiple
3 different parties and multiple different products and
4 multiple different systems.

5 We're talking about a patent that just
6 talks about generic computers talking to each other
7 about payment and access. This is exactly what the
8 preemption inquiry is talking about being concerned
9 about.

10 Another example, if we could go to the
11 next slide. I think this is -- we can put this one
12 up -- is very telling when you're looking at the
13 relative inquiries. Smartflash had conducted surveys in
14 which it's alleging is entitled to damages for the
15 infringement of the accused products.

16 In describing the scope of their
17 products' patent protection, look how broadly they
18 describe it. Question 4 of Exhibit A of Docket 330, For
19 each device listed below, did the capability to purchase
20 apps.

21 Oh, they're patenting the capability of
22 purchasing apps?

23 And then another question. For each
24 device listed below, did the capability to rent and
25 download movies and TV shows.

1 I mean, these are giant fields
2 that they're -- they're -- this is no joke. They're
3 saying they're entitled to damages because their patent
4 covers that giant field. That's what their survey is
5 saying. We think their survey is not worth the paper
6 it's printed on, but that's what they did. That's how
7 they're characterizing it.

8 Again, I'm not going to read all of
9 these, but Smartflash overstates the preemption inquiry.

10 Here on slide 86, we've -- we've quoted
11 how they characterize it, Your Honor.

12 And in slide 87, we show you how it's
13 different from the law. So here at page 11, they say,
14 Complete preemption of a field is required to render a
15 claim patent ineligible.

16 But we know the Supreme Court did not say
17 that in Mayo. I'm not going to repeat it. I just read
18 it.

19 And in Loyalty Conversion as well,
20 quoting Mayo -- in this district, Judge Bryson repeated
21 the correct standard, not the one that defendants would
22 have you use. Other districts have also used the exact
23 same standard, and I've cited a couple of cases on this
24 slide for it. This is the Walker Digital case and the
25 Game Tech case.

1 Smartflash's argument is to point to --
2 (a) there's a non-infringing alternatives so you can
3 subscribe versus streaming. But just think about that.
4 They're saying what's not -- they're saying the claims
5 only preempt storage, not streaming.

6 So, they preempt the entire field of
7 storage? Is what they're saying? I mean, their
8 argument proves our point.

9 Citing a non-infringing alternative like
10 streaming for stored actually demonstrates preemption
11 here in the McRO versus Naughty Dog case, Southern
12 District of California case recently, September 2014.

13 The court found while the patents do not
14 preempt the field of automatic lip synchronization for
15 computer-generated 3D animation, they do preempt the
16 field of such lip synchronization using a real based
17 morph target approach.

18 So, here you see it's the district court
19 interpreting this relative test expressly saying they
20 don't preempt an entire field but they do preempt a
21 subset that's broad. In -- in here, the claims are much
22 more broader.

23 Now, really briefly, Your Honor, the
24 machine transformation test and I'll be done. The tests
25 here, are the claims tied to a particular machine or

1 apparatus; and two, do they transform into a different
2 state or thing. Here again, I'm just repeating myself
3 under a different test. The claims are performed on
4 general purpose computer, not a particular machine.

5 Smartflash own expert, Dr. Jones,
6 testified that the functional code to limitations can be
7 performed by general purpose computer's processor.

8 The claims also do not transform an
9 article. They record only the data be read,
10 transmitted, and received. Unlike Diehr, No article is
11 transformed in a different state or thing.

12 Smartflash argues that in some instances,
13 the asserted claims transform data. But in Cybersource,
14 the Federal Circuit found that transforming data does
15 not meet the machine transformation test as a matter of
16 law, Your Honor.

17 So, unless Your Honor has any other
18 questions, I appreciate your patience with that long
19 argument, but I am complete.

20 THE COURT: All right. Response.

21 MR. SUMMERS: Thank you, Your Honor.

22 John Summers for plaintiff Smartflash.
23 Your Honor, what you just heard was that software is
24 patent ineligible. That's what the argument was. You
25 have to ignore anything that's generic hardware. You

1 have to ignore any instruction.

2 And then after that, abstract idea,
3 patent ineligible. But that's not the rule, and Alice
4 explicitly stated that wasn't the rule. It said that
5 computer implemented-inventions can be and sometimes are
6 patent eligible.

7 And now in the section 101 analysis,
8 there are a lot of moving parts, but all those moving
9 parts sort of get at one fundamental issue. What are
10 the claims trying to do? What are the claims trying to
11 solve?

12 And so in Alice, you saw that the claims
13 weren't trying to solve anything specific on a computer.
14 They were taking a solution from somewhere else and
15 using the draftsman's art to just try to claim that idea
16 on a computer. It wasn't trying to improve computer
17 systems, computer networks, computer communications.

18 And what you'll see in the post-Alice
19 framework, yes, there are a lot of district courts that
20 have invalidated patents under Alice. But when they do
21 that, it's because the patents aren't addressing
22 computer problems. They're addressing non-computer
23 problems.

24 So, really, what the Court needs to do,
25 even though there are, you know, all these parts of the

1 analysis, you have to decide whether something's token
2 activity or an inventive concept. You have to
3 describe -- decide whether there's an abstract and what
4 it is.

5 It all boils down to, What are the claims
6 addressing? And when the claims address a
7 computer-specific problem, those claims are patent
8 eligible. And you can see this in the relevant Supreme
9 Court cases leading up to Alice, and that starts with
10 Diamond versus Diehr.

11 And now opposing counsel talked about
12 that a little bit and tried to pin it into a physical
13 transformation case, but that's not what it was. That's
14 not what Alice says it was. Alice says it's an abstract
15 idea that improves a technological process. That's why
16 the patent in Diamond versus Diehr was patent eligible.

17 And so as opposing counsel was talking
18 about, Diamond versus Diehr was about a rubber curing
19 process. And in that rubber curing process, people were
20 already curing rubber. That was already known. And
21 there was an algorithm in Diamond versus Diehr, and
22 people were -- already knew about that algorithm. And
23 there was a computer in Diamond versus Diehr and people
24 already knew about that computer.

25 What was inventive in Diamond versus

1 Diehr was taking this abstract concept, taking this
2 mathematical formula, and using it to solve a particular
3 problem. Because in the rubber curing process, they
4 couldn't figure out just the exact time when to open the
5 mold and an abstract idea solved that.

6 So you can't just dissect the claim into
7 all these component parts and say, step one; people
8 already did that; step two, people already did that;
9 step three, that seems abstract. Diamond versus Diehr
10 specifically rejected that.

11 That's what Justice Stephens in his
12 dissent was saying the Supreme Court ought to do, and
13 they didn't do that. Diamond versus Diehr is still good
14 law and it was reaffirmed in Alice.

15 So, what Alice did was just take the
16 mantle of a previous case, Parker versus Flook. And
17 Parker versus Flook is really important to compare with
18 Diamond versus Diehr. And Parker versus Flook was also
19 a mathematical formula case, but there it was a method
20 of calculating alarm limit.

21 And all it claimed in Parker versus Flook
22 was an improved method of calculating the alarm limits.
23 It wasn't an improved process for the catalytic
24 conversion which is what the algorithm was used for.
25 The claim didn't talk about the catalytic conversion

1 process. It didn't improve the catalytic conversion
2 process. It was just a better method of calculating.

3 And so what those two cases stand for is
4 that just because there's something abstract in your
5 claim, that doesn't mean it's non-inventive. It doesn't
6 mean it's patent ineligible. You have to look at what
7 those ideas are doing in the context of the invention.

8 And that brings me to Alice. And the
9 reason that the patents were ineligible in Alice was not
10 because they were just implemented on a computer, it was
11 because the patents were directed to a non-computer
12 problem. They were just about enabling the management
13 of risk. It was just the computer being the
14 intermediary and intermediate -- intermediated
15 settlement.

16 And so all Alice did was if you take a
17 non-computer problem and you put computer components
18 on it, that's not going to be enough because that's
19 just the draftsman's art. And that's really what the
20 Court has to decide here is the limitations in the
21 claims.

22 Are they just additions to cover up
23 that it's just an abstract idea, or are they actually
24 doing something? Are they actually solving a computer
25 problem?

1 THE COURT: Couldn't you argue, though,
2 that the problem in Alice was a computer problem, that
3 it was trying to minimize the risk of computer
4 transactions?

5 MR. SUMMERS: Well, but all it was
6 doing -- yes, Your Honor. Minimizing the risk and
7 minimizing the risk in transactions generally had
8 already been solved.

9 And so, minimizing risk in computer
10 transactions is the same thing as minimizing risk in
11 non-computer transactions, and so that's why it wasn't
12 inventive. The only idea was to put it on a computer.
13 The only idea was to think that this would be helpful to
14 put in a computer environment.

15 And so it was just a field of use
16 limitation, confining it to a technological environment.
17 It wasn't improving the computer. It wasn't improving
18 how computers share data or communicate with one another
19 or anything like that.

20 And so, to see this distinction, I think
21 it is -- as opposing counsel was talking about, it is
22 helpful to look at recent district court opinions.

23 And one especially interesting thing is I
24 want to draw Your Honor's attention to six different
25 court opinions and the interesting part of them is it's

1 three different judges, all in the last calendar year.

2 And those three different judges have
3 each decided one computer-implemented invention as
4 patent ineligible and one computer implemented invention
5 as patent eligible. So I want to start with Judge Stark
6 in the District of Delaware.

7 And we saw citation to Walker Digital,
8 but in Walker Digital, the claims were just a method of
9 controlled disclosure of information, and that's
10 something that headhunters have been doing for dozens --
11 hundreds of years. So that was patent ineligible.

12 But then in Helios Software, you have
13 very similar kind of language, but it recited a method
14 of remotely monitoring an Internet session. That was a
15 computer problem. That was patent eligible.

16 And then Judge Pflaezer in the Central
17 District of California, in Enfish, LLC, the invention
18 was directed to just information management and a
19 database system. That's something that people had
20 already been doing. So it was just that idea,
21 recognizing that that idea would work well on a
22 computer. And so that wasn't inventive.

23 But in Cal. Tech versus Hughes, it was a
24 method and apparatus related to error correction and
25 data transmission. And so the instructions in these

1 claims, in these cases are still -- you know, they're
2 software cases. They're still somewhat functional. But
3 if it's trying to solve a computer problem, it's patent
4 eligible.

5 And the same thing with Judge Bryson.
6 Even though TQP was before Alice, the claims in TQP and
7 the claims in Loyalty Conversion are nothing like each
8 other. Loyalty Conversion, method of converting loyalty
9 points from one entity to another. That's -- that's
10 something that's non-computer. That's a non-computer
11 solution implemented on a computer.

12 But in TQP, it's about encryption. It's
13 about communications between computers. And even though
14 the claims are still somewhat general, somewhat
15 functional, it was solving a computer problem that's
16 patent eligible.

17 And so what all those cases stand for is
18 just -- if you've got a computer-implemented claim, you
19 have to look at what it's trying to do.

20 And Ultramercial fits right into this.
21 And the claim in Ultramercial wasn't about a computer
22 problem. It was about a business problem. It was about
23 getting money for advertisements.

24 And now, I think something is especially
25 telling about the argument we just heard. When they

1 were citing to what Ultramercial was about, they were
2 citing to Ultramercial I. They were citing to the
3 characterization by Chief Justice Rader of how the
4 claims were a computer problem.

5 And so what the Federal Circuit did
6 between Ultramercial I and Ultramercial II is they just
7 re-read the claims in light of Alice and determined not
8 the computer solutions to computer problems aren't
9 patent eligible. They just saw through the claims and
10 recognized that this was addressing a business problem
11 created by the Internet but not any specific Internet
12 issue.

13 So that brings me to our claims and what
14 our claims do. And the problem that was addressed was
15 not any business objective. It was data piracy. And
16 that problem was created by generic computers. It was
17 created by the Internet. It's a computer problem to
18 figure out how to deal with this, how to deal with the
19 free flow of generic data between computers.

20 THE COURT: Couldn't you also argue,
21 though, that the problem is granting access to data in
22 exchange for payment? I mean, you're framing your
23 problem is a computer problem and all the other cases as
24 business problems, but couldn't I frame yours as a
25 business problem?

1 MR. SUMMERS: You could frame it that
2 way, Your Honor, but you have to look at the
3 specification and you have to look at the claims and you
4 have to look at the limitations in the claims and see
5 what they're trying to do.

6 And yes, there are limitations in the
7 claims about payment. And yes, there are limitations in
8 the claims about controlling access. But you have to
9 remember there are also limitations about data storage.

10 And when you see those data storage
11 limitations in the context of what was trying to be
12 solved, it wasn't trying to invent a way to pay for
13 something on the Internet. It was a way to figure out
14 if you're going to pay for something on the Internet,
15 how can you give the content owners, how can you give
16 the TV studios, how can you give them a way to maintain
17 control over their data.

18 They're solving -- although the solution
19 to the computer problem does have an affect on business,
20 it does create a market.

21 What it's doing is it's enabling a
22 device, enabling storage to, you know, reach the
23 compromise that device owners and content owners -- or
24 device owners and rights holders were looking for so
25 that you could store this data. But the content owners

1 could write the rules into your data and so sometimes
2 you could carry your data around.

3 And it's not just a generic computer
4 doing generic things. It's using a particular part of
5 one computer in the context of interaction between
6 computers to make sure that the data transfer is
7 something that everyone can get on board with.

8 THE COURT: I think my concern is --
9 well, what I'm not hearing you do is distinguish the
10 claims in Ultramercial from your claims, because I see
11 Ultramercial as a restriction on viewing based on a
12 payment.

13 Now, the payment was watching advertising
14 whereas yours is payment with money, but tell me how
15 it's different.

16 MR. SUMMERS: It's different, Your
17 Honor -- for one, it's different because of the abstract
18 idea that the Federal Circuit found that the claims were
19 directed to. And an abstract idea wasn't controlling
20 access to music. It was using advertising as a
21 currency.

22 And so, all of the steps before using
23 advertising as a currency and all the steps after using
24 advertising as a currency didn't add anything. So,
25 requiring access to be controlled to the public when the

1 abstract idea is using advertising as currency, that's
2 not adding anything.

3 That's just -- that's just making it so
4 the idea can be implemented. It's just making the
5 audience, creating the market as opposed to our claims
6 where, yes, it makes people more likely to pay for
7 things, but it's solving the problem of after you pay
8 for things, what can you do with that data. How can you
9 make your computer better so that people are okay with
10 data distribution.

11 And I just want to show, Your Honor, just
12 how the claims do that. And these are limitations that
13 opposing counsel didn't talk about. And that's that you
14 have to get the data and the data has to be stored into
15 the data carrier. You have to get the access rule from
16 the data supplier, and you write it into the data
17 carrier, and then sometimes the rule is dependent on
18 payment.

19 And so these are all the sorts of
20 limitations that were sort of just overlooked in the
21 briefing and in the argument about what -- what do those
22 limitations do, what do they solve. It's not just
23 controlling access to something. It's controlling
24 access to something -- getting the rule from somewhere
25 else and having it be stored into the data carrier.

1 And so it's not just that a computer can
2 store things. It's deciding that as between the
3 interaction between two computers, that the better way,
4 the inventive way to do it is to put it all on the
5 customers' memory.

6 And it's the same way with things that
7 don't have access rules. It's not just paying for
8 something. It's a way of paying for something. You
9 have to get the payment data from somewhere, from the
10 carrier. And the payment data isn't sent until you get
11 other data, payment validation data, from the data
12 supplier.

13 And so, by pigeonholing all this into one
14 computer environment, it's ignoring the inventive
15 context of the invention, and that's transfer, data
16 transfer, who does what in the interaction between
17 content owners and between purchasers or device owners
18 who want to download data.

19 And so, even if -- even if the idea of
20 paying for something or the idea of controlling access
21 to something is abstract, if that's just an idea, it's
22 implemented in these claims to solve a computer problem,
23 to solve generic storage, to solve a computer not being
24 able to know that this is protected proprietary content.

25 To get into the idea of preemption and

1 what the preemption test is, there are a lot of
2 different ways to sell content. There are a lot of
3 different ways to control access to content. You can
4 stream, you can side-load the data, you can control
5 access from the server, or you can do different ways of
6 paying for the data.

7 The payment data doesn't have to come
8 from the carrier, or it doesn't have to be responsive to
9 retrieving the content. Doesn't have to be responsive
10 to the payment data transmission. And those are all
11 limitations that are within their claimed abstract
12 ideas.

13 There are better ways of paying for
14 digital content. There are better ways of controlling
15 access to digital content because you can control access
16 in other ways. You can pay for things in other ways.

17 So, to go to the idea of relative to the
18 contribution of the inventor and what does that mean,
19 and when you look at Mayo, and when you look at cases
20 citing that portion of Mayo, all they're really saying
21 is that if all the inventor did was come up with an
22 abstract idea and recognize that it would be useful in
23 some technological environment, then relative to the
24 contribution of the inventor, preempting that idea in
25 that technological environment isn't appropriate.

1 That's too much because all the inventor
2 did was think that a pre-existing abstract idea, that a
3 non-computer abstract idea might be useful on a
4 computer. So relative to the contribution of the
5 inventor, those claims are going to be invalid.

6 But there's really no case, and it
7 doesn't even seem workable to figure out what exactly is
8 everything new in a claim and just decide whether that's
9 too broad. There's -- it just doesn't make any sense,
10 especially in the software context where software claims
11 are written in functional language because that's the
12 person of ordinary skill. That enables someone to do
13 this.

14 And so I just want to show, Your Honor, a
15 particular patent. And this is Apple's slide to unlock
16 that. And Apple asserted this against Samsung to
17 verdict about six months ago, I think. And this -- just
18 goes to show you this is what software patents look
19 like.

20 A portable electronic device,
21 compromising: A display; memory; one or more
22 processors. One or more modules. Instructions: To
23 detect, to move, in accordance with movement to the
24 detected content, unlock.

25 Now, I'm not saying that this isn't

1 ineligible invention. All I'm trying to say is that
2 this idea that Mr. Racz couldn't program software -- if
3 one of Apple's star engineers had thought of this
4 concept in 1999, if one of Samsung's star engineers had
5 thought of this concept in 1999, the patent would look
6 the same because it contributes to the art. It enables
7 someone of ordinary skill to implement the invention in
8 a useful way.

9 So, Your Honor, I just want to touch a
10 little bit on some of the other arguments that opposing
11 counsel made, and one of them was this idea of the
12 survey and how we surveyed these broad categories. And
13 that's not totally accurate.

14 What we did was we surveyed people's
15 value of the patented feature -- or of the accused
16 infringement, and then what we did was we surveyed how
17 much more they value that over the non-infringing
18 alternatives over the reason that our claims don't
19 preempt the field.

20 And so, it wasn't that we thought our
21 claims covered all of that or any way to pay for apps or
22 any way to download content. It was just we wanted to
23 see how much value that idea had, and then we wanted to
24 see how much value that was over the other ways to do
25 it, over our inventive contribution.

1 So, Your Honor, again, these are data
2 transfer, data storage. Those are computer problems.
3 Just because computers have memory and just because
4 computers can do functions, you have to look at the
5 context of the claims. You have to look at the
6 inventive context, see what the claims are trying to do.

7 And different claims try to do different
8 things, which is why you can't just look at a couple of
9 claims and say, oh, this is the same. They solve
10 computer problems and that's why they're patent
11 eligible.

12 Thank you, Your Honor.

13 THE COURT: All right.

14 MR. VERHOEVEN: Your Honor, just brief
15 response, please. Thank you.

16 Thank you, Your Honor.

17 Could we go to slide 77, please.

18 This I didn't get a chance to get to.
19 Your Honor, this is exactly what you just heard, which
20 is we saw basically for the first time in the sur-reply
21 which is -- I'll call it the Hail Mary argument, but
22 it's this invention of a new test that doesn't exist in
23 the law. Is it a computer problem or a computer
24 solution? That is not a test you find articulated in
25 Alice. That's not a test you find articulated in

1 Ultramercial. It's a test made up by the plaintiff in
2 this case, is not found in the law.

3 Look at Ultramercial, Your Honor. This
4 is 722 F.3d at 1349 through '50. The '545 patent seeks
5 to remedy -- seeks to remedy problems with prior art
6 banner advertising over the Internet, such as declining
7 click-through rates by introducing a method of product
8 distribution. Their argument runs straight into
9 Ultramercial II which is controlling in this case.

10 And Your Honor's comment a couple of
11 times is very insightful. I can take this language and
12 make the same argument and say this is computer problem,
13 computer solution. Look at it.

14 It says right there the problem is with
15 advertising over the Internet, and it's got a better
16 solution for advertising over the Internet. But
17 nevertheless, the Federal Circuit in the controlling
18 opinion has found, no, this is an abstract concept.

19 And so you can characterize this just
20 like you can characterize our patents as a business
21 method, payment and access, or you can characterize it
22 in the specific field, which is the data. We know from
23 the precedent the characterizing an abstract idea within
24 a specific field does not take it out of abstraction.

25 The test, Your Honor, is not, Is it a

1 computer problem solution? That's not the test.

2 The test is Alice, and Alice says, What's
3 the first step? You tease out the abstract idea and
4 that -- and you look at that idea and say, Is that
5 patent ineligible? Is this a basic building block
6 that's used for centuries to conduct commerce? In our
7 case it is.

8 I -- I suggest a persuasive piece of
9 evidence on this is what's happened at the PTAB. And so
10 here we're citing on slide 79, this is -- you know,
11 Smartflash is saying it's claiming a technological
12 invention, computer solution to computer problem. And
13 it's not just a business method.

14 Well, the PTAB's already found, Your
15 Honor, that the asserted patents are business method
16 patents, not technical patents that are eligible for
17 covered business method review. So the very -- the test
18 itself is not the real test.

19 But, Your Honor, if that was the test,
20 the PTAB's already said right here the problem being
21 solved by Claim 8 is a business problem, data piracy.
22 It's not a computer problem. The PTAB has said so.

23 And then the next slide again.

24 Over and over Claim 18, Claim 12, Claim 7
25 of these patents, the PTAB said, yes, this is a business

1 problem. Data piracy not -- is not a technical problem
2 solution. So, point one, the test is wrong. Computer
3 solution is not the right test. Step two, even if it
4 was, we would totally satisfy it as shown by the PTAB.

5 Final point, Your Honor, is we saw
6 slides where -- couple of slides from counsel -- I don't
7 have copies -- that said it's not just paying for
8 something; it's a specific way of paying for something.
9 And it's not just controlling access to something, but
10 it's a way.

11 And they talked about the steps of
12 implementing that. They showed steps of receiving and
13 whatnot. Well, that's -- what they're ignoring is Alice
14 again. In Alice, the way is step two. The way to step
15 two, you're supposed to tease out the abstract idea
16 first and then ask is the way they're performing that
17 abstract idea something that's novel or innovative.

18 So, Your Honor, saying -- saying in step
19 one that it's the way of doing something is ignoring,
20 again, Alice. And with that, Your Honor, I'll sit down.

21 THE COURT: Thank you.

22 Final word, Mr. Summers.

23 MR. SUMMERS: Thank you, Your Honor.

24 Again, counsel's citation of the
25 Ultramercial opinion when characterizing what the claims

1 are directed to, that was Ultramercial I.

2 And after Alice, the Federal Circuit said
3 that's not what the claims were directed to. They were
4 directed to advertising as currency. So, they were
5 rejecting that in the context of those specific claims.
6 It was a computer problem.

7 And to go back to Ultramercial, it's
8 important to remember that Ultramercial, yes, generic
9 hardware doesn't necessarily apply an inventive concept.
10 But the claims in Ultramercial were pure method claims.
11 There was no specifics in the interaction between the
12 customer and between the content provider.

13 And again, all of the limitations in
14 Ultramercial just set up the environment to execute that
15 abstract idea. All of them. The controlling access,
16 the clicking content, all of that is necessary to use
17 advertisement as currency.

18 All of that is necessary so that all of
19 those limitations were token limitations because all it
20 was doing was setting up how to use advertising as
21 currency. That's not what our claims do for paying for
22 things. That's not what our claims do for controlling
23 access to things. There are specific ways to control
24 access to things. There are specific ways to pay for
25 things.

1 And I just want to show Your Honor to one
2 specific claim from the '772 just to show you again
3 how -- how there are additional limitations in the
4 controlling access process. It has to be written.

5 MR. CALDWELL: The underlining is my old
6 copy, so ignore the underlining.

7 MR. SUMMERS: It has to be written into
8 the non-volatile memory. The rules have to be written
9 into the non-volatile memory. Once the rules are there,
10 you have to compare the status and the rules.

11 It's not just a highly generalized have
12 access control. It's not a highly generalized get
13 content. It's a way of doing that, and it's a way that
14 improved data transmission and how data is transmitted
15 from content owners and customers.

16 Thank you, Your Honor.

17 MR. VERHOEVEN: Just one point. I'm
18 sorry. It was raised for the first time. Counsel made
19 the comment that Ultramercial II is just method claims
20 as if that was a distinguishing factor.

21 Your Honor, if you look at Alice
22 Corporation -- you've got it. Okay. I won't make it
23 then.

24 THE COURT: Okay. What claim did you put
25 up there? I just didn't get it.

1 MR. SUMMERS: It's '772, Claim 25. The
2 one that's asserted is 26, which it just depends upon
3 it.

4 THE COURT: Okay. All right. So we've
5 been going about an hour and a half.

6 Yes, Mr. Caldwell.

7 MR. CALDWELL: I'm sorry. On this point,
8 I think what ended up happening is we pointed out you
9 have to look claim by claim and they never did. But
10 then today they said, okay, well, we've done it now in
11 our slides.

12 So, I guess my -- my concern is that if
13 Your Honor wants to entertain the now unrebutted new
14 information on them going slide by slide, please notify
15 us if -- if the Court wants some sort of further
16 submission on that.

17 THE COURT: Okay. We're going to take a
18 break, and so why don't you look at these slides. And
19 when we come back, I may hear some -- some argument.
20 You know, if you want to address those slides, if you
21 want to talk a little bit more about them, I know that
22 we're -- we've got a lot of ground to cover today, but
23 this is an important motion and I want you -- I want you
24 to fully argue it, so...

25 Also, though, during the break, I'd like

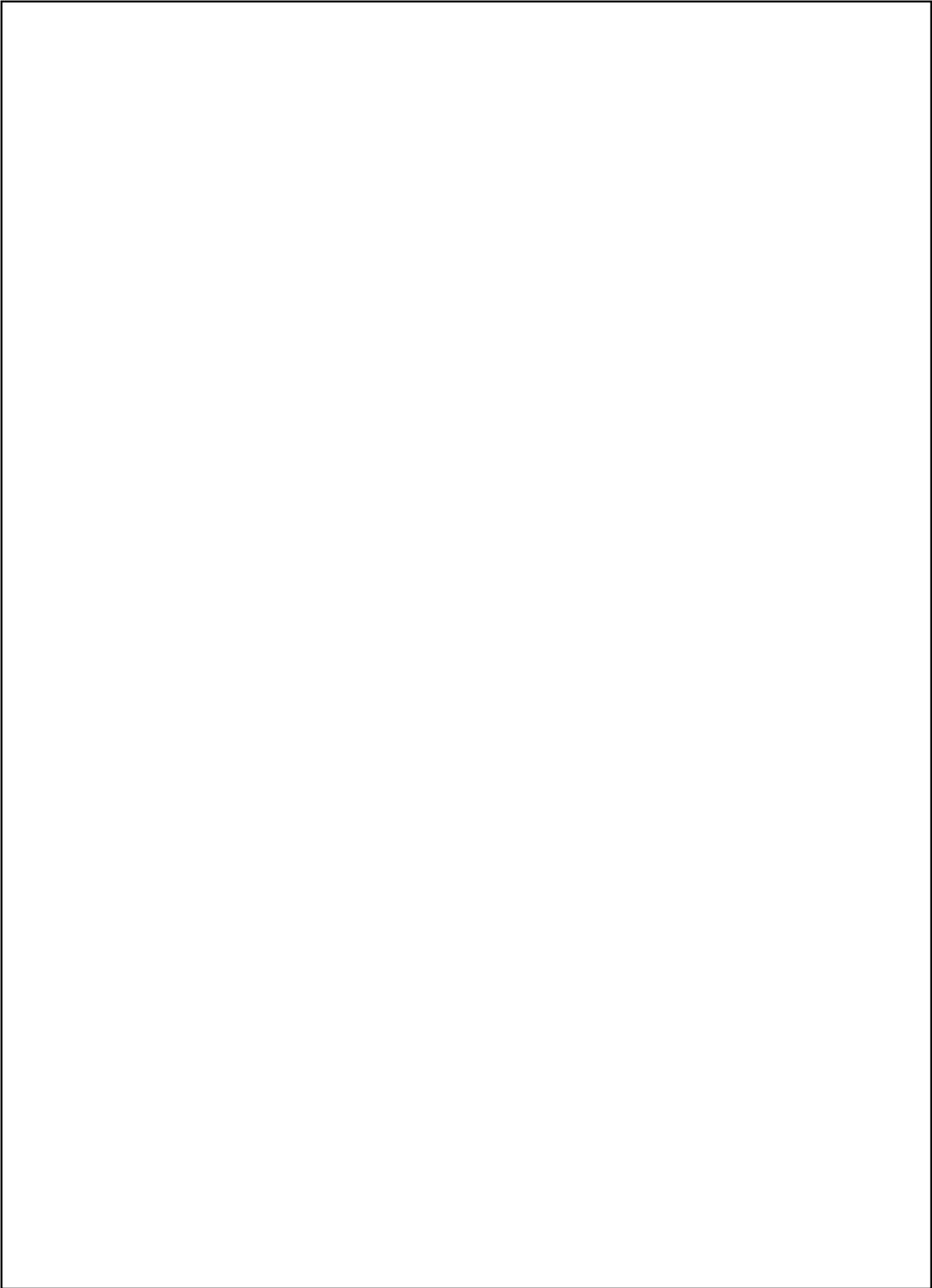
1 counsel to discuss this sealing of the courtroom issue
2 and dispute, and what I'm going to do is we're going to
3 take a 20-minute break for everybody, but in 15 minutes
4 I'm going to come back and talk with those of you that
5 need to talk with me about that specific issue. Okay.

6 So, I will be back in here at 10:45 to
7 deal with that issue. Everybody else that's not subject
8 to that or part of that or involved in it, don't come
9 back in the courtroom. We'll let you know when you can
10 come back in. Okay.

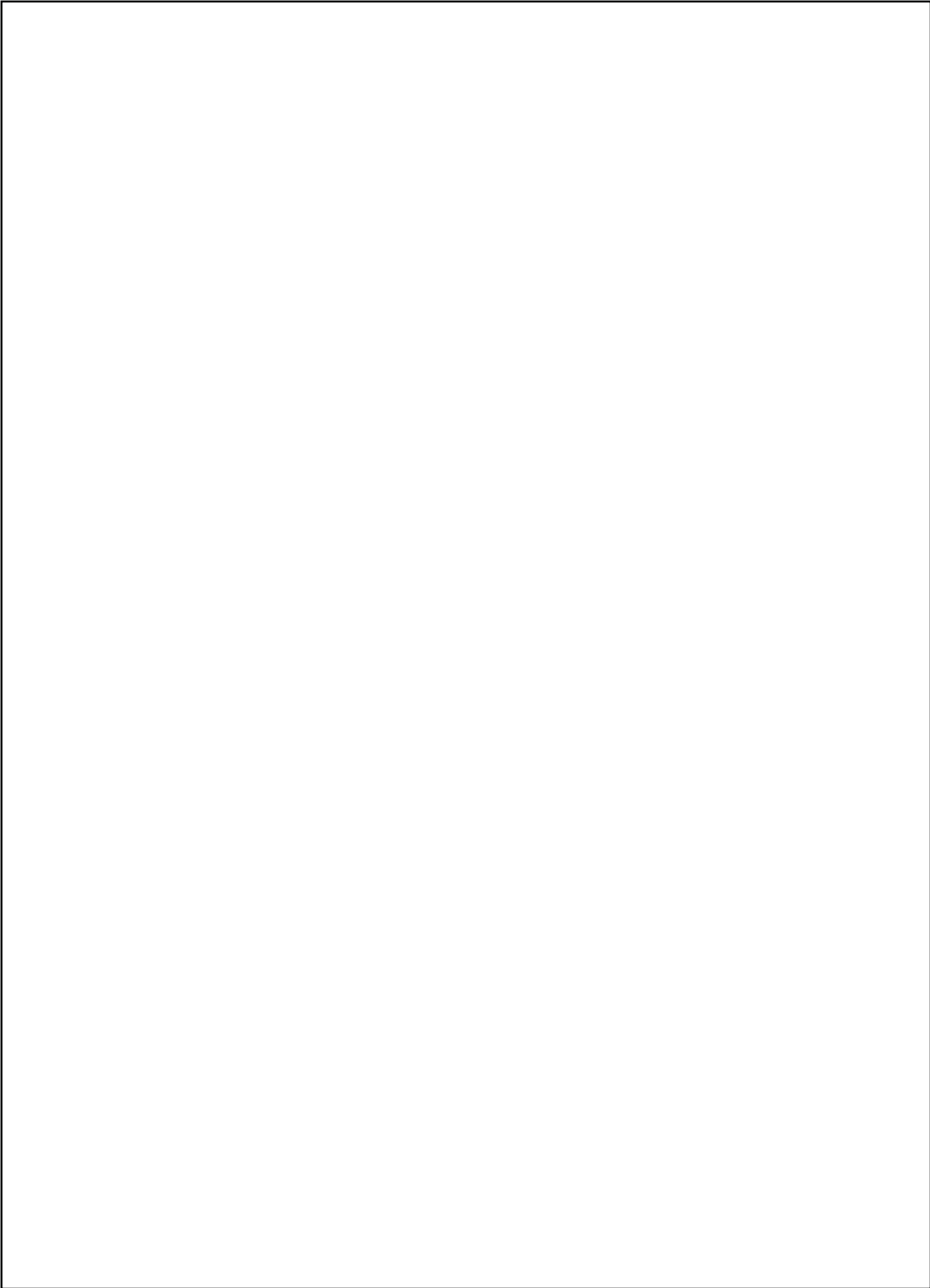
11 We'll be in recess.

12 (Sealed portion of transcript.)
13
14
15
16
17
18
19
20
21
22
23
24
25

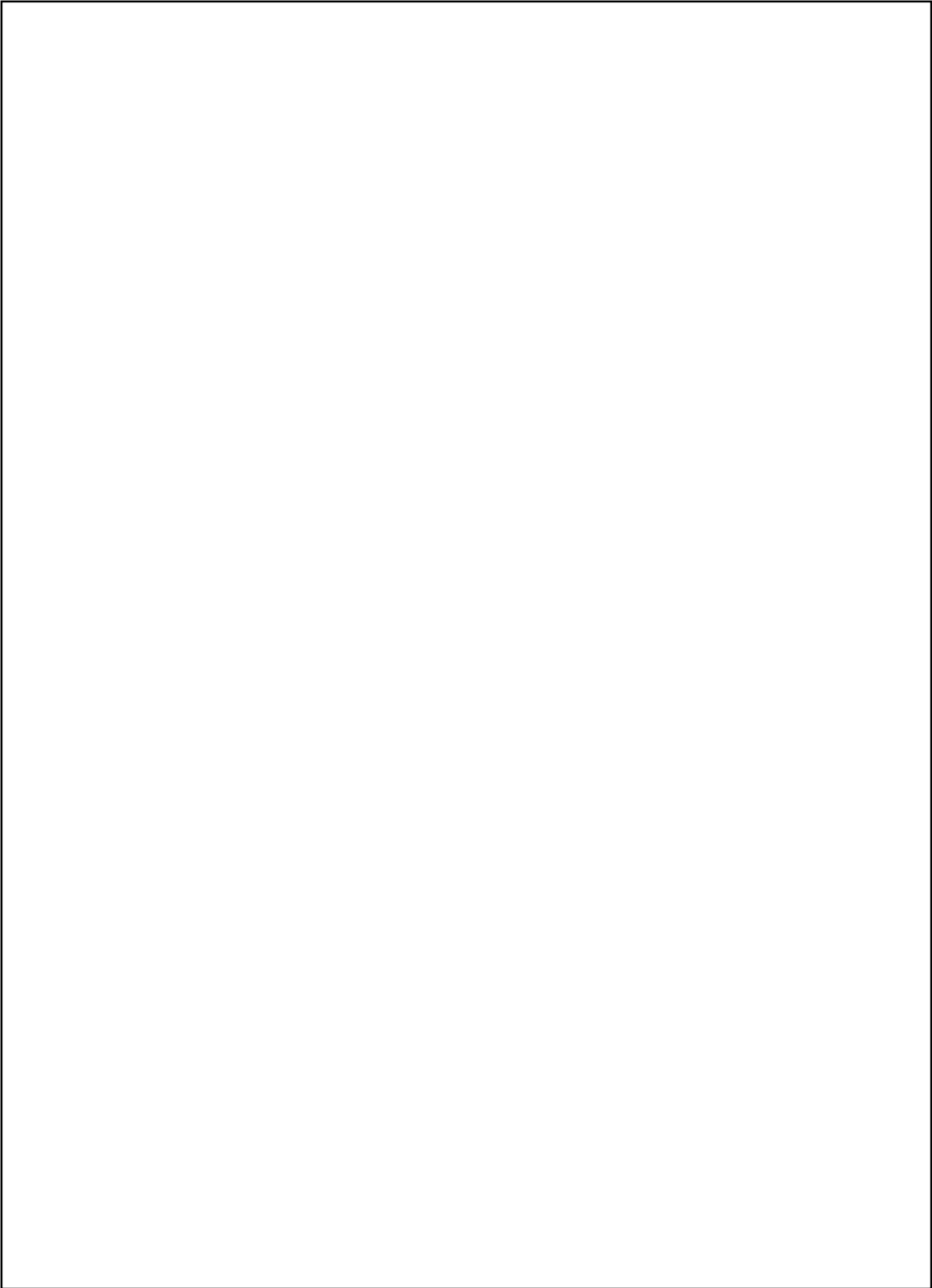
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Jill E. McFadden, CSR

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Jill E. McFadden, CSR

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Jill E. McFadden, CSR

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Jill E. McFadden, CSR

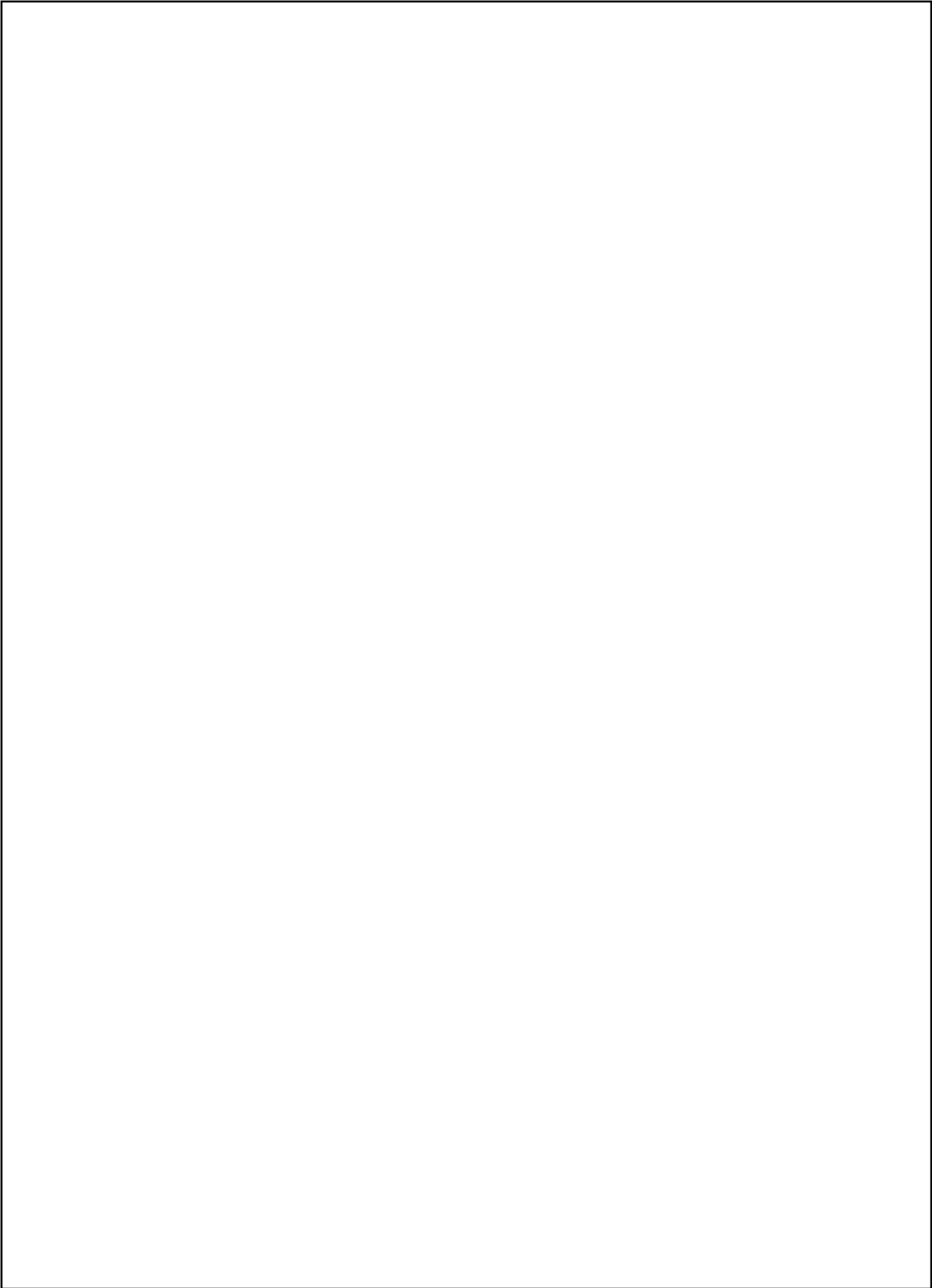
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Jill E. McFadden, CSR

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Jill E. McFadden, CSR

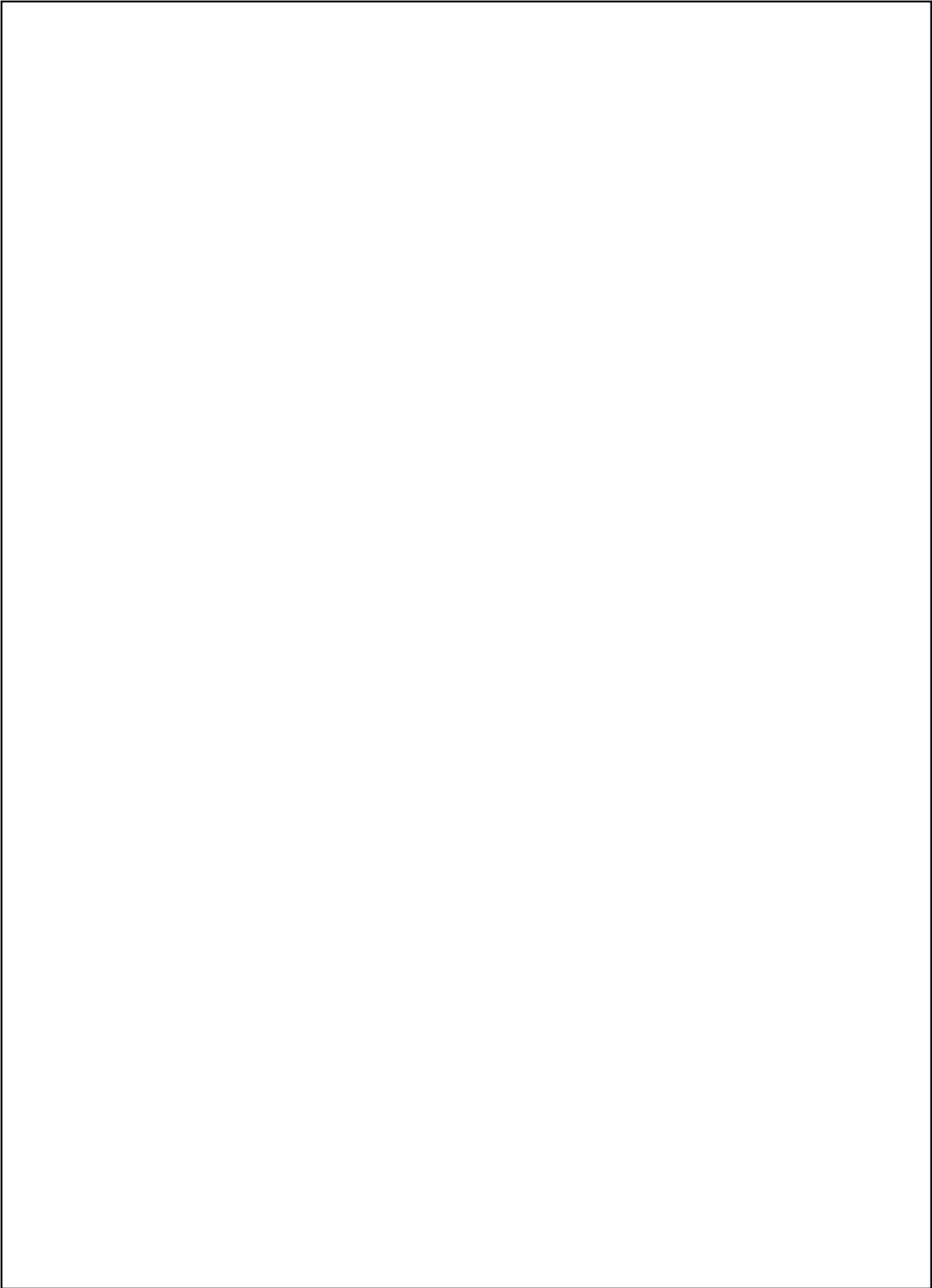
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Jill E. McFadden, CSR

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Jill E. McFadden, CSR

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Jill E. McFadden, CSR

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Jill E. McFadden, CSR

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(End of sealed portion.)

THE COURT: All right. So, we're still on the 101 motion. Did you guys talk about whether we're going to go through this --

MR. VERHOEVEN: We did.

THE COURT: Okay.

MR. SUMMERS: Yes, Your Honor. We had the opportunity to look at the 247 slides that they prepared and --

MR. SMITH: I'm sorry. Your Honor, I don't know if you -- is in-house counsel for Google, also?

MS. BAILY: Yes. We're -- we've moved on.

MR. SMITH: Oh, okay. I'm sorry. I'm sorry, I didn't mean to interrupt. I wasn't sure.

THE COURT: Tell me your name.

1 MR. SMITH: I'm Kevin Smith.

2 THE COURT: Okay. Mr. Smith, I just
3 wanted to get it for the court reporter.

4 MR. SMITH: I'm sorry. I didn't mean to
5 interrupt. I just wanted to make sure since it's such a
6 sensitive issue.

7 MR. SUMMERS: So I had the opportunity to
8 look through the 247 slides, and it looks like what they
9 did -- you know, I can't go through 247 slides. We
10 don't have all day. But what they did for each claim is
11 they did exactly what they did for the representative
12 claim. They just took ever limitation, they dissected
13 it, and said in one case this wasn't enough. In this
14 case, it wasn't enough. In this case, it wasn't enough.

15 But as you can tell from Diamond versus
16 Diehr and the progeny afterwards, that's too simplistic
17 of a way to view it. You have to look at it in the
18 context of the invention.

19 And just before I sit down, Your Honor, I
20 just want to take a look at the Ultramercial claims and
21 take a look at our claims. And, Your Honor, this is the
22 Ultramercial claim and we've heard a lot about how
23 there's a step of restricting public access. There's a
24 step of offering to a consumer access to media.

25 But in Ultramercial, it doesn't tell you

1 anything, anything about how to do that. It doesn't
2 tell you how to restrict access. It doesn't tell you
3 how to -- how the consumer is supposed to get this
4 content.

5 And now I want to show you our claims.
6 And, Your Honor, this is Claim 3, which is the
7 independent asserted Claim 13 in the '720 patent. This
8 claim tells you how to pay for content and how to
9 control access to it after you get it.

10 You have to read payment data from the
11 data carrier. You have to receive payment validation
12 data. Responsive to payment validation data to
13 retrieve. Responsive to the payment validation. To
14 receive an access rule from the data supplier. Write it
15 into the data carrier. And give certain conditions for
16 what the access rules should be, what it should contain.

17 That's not just controlling access to
18 something. That's a way to implement it that solves the
19 data piracy problem, that's a computer solution, and
20 that's a patent eligible invention.

21 Thank you, Your Honor.

22 THE COURT: Response.

23 MR. VERHOEVEN: Very briefly, Your Honor,
24 if I may. First, if I now have permission, I think the
25 other side can hand up that deck.

1 THE COURT: Yes.

2 MR. VERHOEVEN: And I think that counsel
3 accurately characterized it being nothing more than we
4 did for Claim 11. We contend that Claim 11 covers all
5 the functional -- or the other claims anyway, they're
6 similar, but in case there's any question, we just went
7 through it for the record. So I'll just hand that up.

8 I want to note, Your Honor, on this issue
9 of whether we need to brief all the claims or not and go
10 element by element by every claim, the Ultramerical case
11 expressly says -- and this is at -- I don't have the
12 Fed 3.d pages yet, but it's at star 2 from the Westlaw
13 site.

14 Quote, As the other claims of the patent
15 are drawn to a similar process, they suffer from the
16 same infirmity as Claim 1 and need not be considered
17 further.

18 And if you look at Alice and Ultramercial
19 and all these cases, you find that they analyze a
20 representative claim as part of the opinion. They don't
21 go through and -- you know, rote claim by claim element.
22 They pick one and they say -- and then they address the
23 arguments that are made. I mean, if there's some other
24 claim that the patentee wants to point to and say, hey,
25 you missed this, well, that will come out through the

1 briefing process.

2 So, also I note the Amdocs case, Your
3 Honor, Fed. supp. 3d -- and this is a new case, Your
4 Honor, so it doesn't have formal cites -- Eastern
5 District of Virginia case. At star 5 also notes, Both
6 Amdocs and Opennet only -- only present arguments
7 regarding Claim 1.

8 This accords with Alice, Mayo, and Bilski
9 in which the Supreme Court found that various claim
10 types, method system, et cetera, directed to the same
11 invention should rise or fall together. So, we don't
12 believe we have to do this, but we've done it for, Your
13 Honor.

14 Then just briefly to address the point
15 that they keep going back to about the specifics,
16 they're talking about the way to do something.
17 That's -- you're ignoring Alice again. First step is
18 you extract the abstract idea, and that -- they haven't
19 addressed that.

20 What is the abstract idea? They're
21 pointing to specific process steps that accomplish the
22 payment and the controlling, and that's step two. And
23 when you apply step two, Your Honor, you'll see that all
24 of those steps are just routine hardware and software
25 components.

1 And final point I want to note is they
2 got up -- their final point is to distinguish
3 Ultramerical. They're opening brief, they embraced
4 Ultramercial. They said that patent was just like our
5 patent. So their arguments, I would submit, change
6 because the Ultramerical II case came out, and now
7 suddenly they're distinguishing the very patent that
8 they embraced before.

9 MS. FUKUDA: Your Honor, if I may have
10 just less than one minute.

11 THE COURT: Sure.

12 MS. FUKUDA: Smartflash has repeatedly
13 put up exemplary claims where they point to the fact
14 that content is written to memory or that use rules are
15 stored in this non-volatile memory as the distinguishing
16 factor that should take them out of the world of
17 abstract ideas, and I just wanted to emphasize the point
18 that the Eastern District of Texas in Loyalty has
19 addressed this very issue on slide -- I think this is
20 slide 40 of Mr. Verhoeven's presentation.

21 It says that -- specifically addresses --
22 oh, 41.

23 UNIDENTIFIED SPEAKER: Is it the appendix
24 or --

25 MS. FUKUDA: It ought to be the first one

1 after --

2 MR. VERHOEVEN: No, not the appendix.

3 MS. FUKUDA: Well, I can just read it
4 for the Court.

5 MR. VERHOEVEN: There it is.

6 MS. FUKUDA: It says that all those
7 functions consist of simple forms of data recording,
8 storage, and calculation, all of which are conventional
9 functions that can be performed by a generic computer
10 without any novel programming or improvement.

11 That's all their claims -- the Smartflash
12 claims are directed to. The shared storage into
13 non-volatile memory is not anything inventive. It's
14 completely generic computer orientation.

15 Thank you, Your Honor.

16 THE COURT: Thank you.

17 All right. Mr. Summers.

18 MR. SUMMERS: Your Honor, just three
19 quick points. First, in our initial briefing, we didn't
20 say our claims were exactly like the Ultramercial
21 claims. We were saying our claims improve computer
22 technology. And the Federal Circuit just looked at the
23 claims and saw that they weren't improving computer
24 technology, and our claims are different as we just
25 showed you.

1 And, Your Honor, opposing counsel just
2 made one of our points for us, that you can't just say
3 all these inventions are the same. There are different
4 limitations in different claims and they do different
5 things.

6 And so that's why it's our position, Your
7 Honor, that they have the burden to show all of the
8 claims. Any claim they want to prove invalid, they have
9 to show you why that isn't inventive other than just
10 saying, oh, this is generic, or things like that.

11 And so, Your Honor, the claims that were
12 shown aren't representative. They aren't
13 representative. They didn't have comparison of use
14 status and use rules. They didn't have necessarily
15 stored into non-volatile memory. And so, Your Honor,
16 has to look at the claims -- Your Honor has to look at
17 the what the claims are trying to do in the context of
18 the invention.

19 When you see Loyalty conversion,
20 that's -- it wasn't about transfer. It wasn't about
21 moving things between two computers. It was just a
22 computer storing something, and so that's why the
23 holding was, you're just taking an abstract idea and
24 dolling it up with computer hardware.

25 That's not what the claims do. They use

1 specifics of one computer hardware to solve a problem
2 that arises from the interaction of data and the
3 interaction of computers.

4 Thank you, Your Honor.

5 THE COURT: All right.

6 We're going to move on.

7 MR. VERHOEVEN: I'd just be repeating
8 myself if I got up, Your Honor.

9 THE COURT: All right. Then what is
10 next?

11 MR. CALDWELL: Your Honor, I believe the
12 next agreed motion would be in the Apple case, Docket
13 Number 277, which is plaintiff's motion to strike
14 portions of the rebuttal expert report of Anthony
15 Wechselberger. He's one of Apple's technical retained
16 persons.

17 May it please the Court.

18 THE COURT: Yes.

19 MR. CALDWELL: Note that it's apparent
20 from the title slide what this motion is, is to strike
21 portions of the Mr. Wechselberger's report. We're not
22 seeking to strike his entire -- entire report.

23 And what Mr. Wechselberger did is he's
24 given opinions on non-infringement, things on
25 invalidity. I think he's made remarks about 101 or

1 maybe 112, just a variety of different things.

2 But one thing he did in a rebuttal report
3 is really what we're addressing here. This isn't
4 seeking to strike his non-infringing or invalidity
5 arguments, nor is it seeking to strike their attacks on
6 survey methodology and that sort of thing.

7 What Smartflash is seeking to strike with
8 this motion is just Apple's identification through this
9 expert of alternatives -- alleged non-infringing
10 alternatives that Apple says it could switch to but that
11 they did not tell us about during discovery, and they
12 still haven't provided discovery.

13 Now, it's interesting because we've been
14 talking about this other third party issue. Keep in
15 mind this isn't some third party over which no one took
16 discovery or anything like this. This is Apple refusing
17 to answer our discovery as to what they could switch to
18 and then putting out, not in their burden report even
19 but in their rebuttal report -- maybe that doesn't
20 matter -- but in the rebuttal report as late as
21 possible -- these alternatives that said we could have
22 switched to.

23 And to this day, they have not answered
24 the interrogatory about non-infringing alternatives they
25 could switch to. To this day, they are standing on a

1 refusal for us to get to depose somebody on it. And
2 I'll get around to this in a minute, but I'd like to --
3 I'd like to make it clear.

4 I mean, you've seen arguments like this,
5 right? Something like this happens in all these kind of
6 cases it seems like. And often -- I'm not jealous of
7 the position the Court's in in this sort of situation.

8 And one of the things that comes out of
9 it quite frequently is, well, the solution is, I know
10 everybody's busy but you've got a bunch of lawyers, why
11 don't you go depose the guy now. Give them the update
12 to the interrogatory. You go depose the guy and that
13 will cure it. Well, it won't.

14 Because what happened is Smartflash, at
15 significant expense to ourselves, ran a survey and in
16 reliance on Apple saying, no, we don't have
17 alternatives. Not just standing on objections, saying
18 we don't have alternatives. So, allowing even a cure of
19 it now and allowing this undiscovered information to
20 slip in through the back door is terribly prejudicial
21 to -- to Smartflash.

22 I'll try and go through the slides pretty
23 quickly, but I just wanted to give context.
24 Interrogatory Number 6 is a common interrogatory.
25 And -- and for the Court's background, the way the

1 discovery order came out in this case because of the
2 overlap, even though there's two civil action numbers,
3 there were certain interrogatories that they could
4 propound on us commonly and we could propound on them
5 commonly and they'd all have to answer it.

6 This is one of the ones we use as a
7 common interrogatory because it's just sort of your -- a
8 typical rog you ask in almost every case -- every patent
9 case. Identify and describe what you contend is your
10 best alternative to infringing Smartflash's patents and
11 all associated costs.

12 We've proceeded down two lines. Two cars
13 were on the same highway for a little bit. The two cars
14 on that highway were Apple and Samsung, both of them
15 refusing to answer this. Samsung drew a line in the
16 sand and said, No, we're standing on our objections. We
17 will not be answering that interrogatory.

18 So, you may remember we had a motion to
19 compel, and then the date for providing the information
20 came and went and it was followed up upon at the Markman
21 hearing. Eventually, we got an answer in discovery to
22 this question from Samsung. Okay. And then when it
23 came time for their burden reports, they address it --
24 they address it there.

25 Apple -- as I say, they were on the same

1 highway for a while and they gave basically the -- the
2 objection-type answer, not -- not addressing it
3 substantively.

4 And just for the record, I have skipped
5 over the -- two-thirds of a page of boiler plate that
6 would be before this, and -- and what I'm doing at slide
7 3 is directing the Court to the closest thing you could
8 say is sort of a need to bear answer to this
9 interrogatory.

10 And it says, As of the date of this
11 supplemental response -- and this is, like, maybe
12 the second or third time they had supplemented -- Apple
13 has not yet developed specific contentions regarding the
14 best alternative in any event -- in the event that
15 anything is found to infringe. Discovery's still
16 ongoing. We reserve our right to supplement.

17 So, the natural question may be, okay,
18 you filed your motion on -- on Samsung. Why don't you
19 revise and file one over in the '447 case against Apple.
20 But there's more to the story.

21 We also served 30(b)(6) notices on Apple
22 and these were kind of customized per defendant. But
23 the Apple one had several topics really getting at this
24 issue, some more than others but certainly on this
25 issue. One was all efforts to design around the

1 patents-in-suit, have there been any.

2 Topic 164 I'd really like the Court to
3 pay very close attention to this one, because I'll come
4 back to it in a minute. Any allegedly non-infringing
5 alternatives to the invention claimed in the
6 patents-in-suit and the cost and acceptability of such
7 allegedly non-infringing alternatives in the
8 marketplace. We asked that to Apple.

9 Any efforts to acquire a license that you
10 would need for any of these design-arounds, and any
11 customer feedback or complaints regarding any allegedly
12 non-infringing alternatives you've implemented. So if
13 you've ever done one of these things before, do people
14 like it or not.

15 But -- and I realize some of them are
16 sort of specific. It's like, Did you get licenses? Did
17 you get customer feedback?

18 Plainly, Topic 164 is your generic. You
19 got to tell me what it is that you think you might do as
20 a non-infringement alternatives. We got the usual
21 objections on it. I understand that -- that slide
22 number 5 is kind of zoomed out. I'm happy to give it to
23 you if you care to read it.

24 But this is the boiler plate part of the
25 objections that's broad, unduly burdensome, vague and

1 ambiguous, so on and so forth. But the telling part, I
2 think, is on the -- when it carries over to the second
3 page, their objection to Topic 164, where the substance
4 of Apple's objections, I guess, or responses to that
5 notice says, Subject to the foregoing general and
6 specific objections, Apple will meet and confer with
7 Smartflash after providing a supplemental response to
8 Smartflash's common interrogatories on -- on this
9 non-infringing alternative and/or design-arounds to
10 determine whether a witness can be identified.

11 So, as to the 30(b)(6), it's like, well,
12 we refuse to answer your rog on it, and I'm not going to
13 give you a witness because I haven't answered your rog;
14 but if I ever deem to answer your rog, then I'll give
15 you a witness on it.

16 And what ended up happening at this point
17 is we had a lengthy dialogue. And this is sort in the
18 same timeframe that we were moving to compel against
19 Samsung, but -- and I have to say, for the most part,
20 we've gotten along with Apple very well in
21 communications. The communications are always civil, I
22 think, and -- from both sides and we've been able to
23 resolve a lot of things.

24 And so this is actually something that,
25 in that vein, the parties worked on for quite a while to

1 see if we could head towards some common ground. And
2 there was a lot discussion on this. But at the end of
3 the day, you know, we said, Guys, we cannot wait on this
4 anymore.

5 And what's happening is, at this point,
6 our survey guy -- and they hire, like, third parties
7 that administer the actual tests. I mean, we're --
8 we're pumping large amounts of money into this. The
9 experts have contributed to defining questions that will
10 be in there and defining possibly alternatives so you
11 can kind of try and evaluate how consumers react to
12 differences if you switch to something that would be
13 non-infringing. We put a lot of effort into that.

14 And we're telling Apple we got to know
15 what's going on here. And we finally get sort of a
16 clear answer in a letter from Apple's counsel, and I'll
17 zoom in here. Basically, the long and short of it, the
18 Court's free to read the whole photograph, obviously,
19 but the long and short of it is, To date: Apple has not
20 identified any such design-arounds/non-infringing
21 alternatives and opinions of counsel. Accordingly,
22 there is no testimony for an Apple corporate witness to
23 provide on these.

24 I didn't want to highlight literally
25 everything in there, but one thing that's kind of --

1 kind of telling -- because this is basically the last
2 time that Apple really said, Here's our position. We're
3 not giving it to you. We're not giving you some
4 non-infringing alternatives or answering your
5 interrogatory.

6 The middle white portion of the text --
7 it's not highlighted -- is pretty important. Apple says
8 because there are claim construction disputes pending
9 with the court, Apple reserves its right to identify any
10 such design-arounds/non-infringing alternatives and
11 opinions after an order construing the claims is issued
12 by the court.

13 What I think is telling about that is
14 sort of two-fold; one, I think it was Judge Everingham
15 that once observed, Guys, you can't stiff the other
16 party on discovery just because there's not actually an
17 order from the Court on claim construction. Once the
18 fights -- once the issues have been joined by the
19 positions the party took on claim construction and
20 you're on notice, you got to -- you got to provide
21 discovery.

22 And I think it was in the context of
23 maybe an order denying leave to add a new DOE theory or
24 something along those lines. You can't claim to be
25 surprised because one of you got the construction you

1 asked for six or eight months ago. So I take issue with
2 that. I don't think that's a grounds to -- to withhold
3 discovery anyways.

4 But more to the point, when Apple
5 eventually put these non-infringing alternatives out on
6 us, that was before -- that was still before the Court's
7 claim construction. So when their expert did it in his
8 rebuttal report, it was still before the Court's claim
9 construction.

10 And they have -- to this day, even in
11 view of the Court's claim construction, which basically
12 adopted either plain meaning or constructions along with
13 the parties, still haven't done anything on the
14 interrogatory or the 30(b)(6) notice, which I say at
15 this point it's -- it's too late for a cure.

16 So, to get to really what -- what
17 happened, nothing happened in the close of discovery,
18 and then nothing happened with the burden reports. But
19 then you get to the rebuttal reports and this is where
20 Dr. Wechselberger starts to address this issue.

21 What I'm showing here on slide 8 are some
22 excerpts from Anthony Wechselberger's rebuttal reports.
23 And what he says is, well, Dr. Jones -- okay. For
24 background on the survey, if you're going to compare
25 features versus alternatives, you need to be able to

1 propose something, and it's got to be in some sort of
2 plain English that a juror can -- a juror -- the survey
3 recipient can understand and that sort of thing,
4 obviously.

5 So, what happened was, to make sure that
6 it is tied to what's going on, we had our survey guy
7 Dr. Wecker, we had our economist Mr. Mills, and we had
8 professor Mark Jones who's on the technical side, and
9 counsel looking at cases, and people work together to
10 craft the right kinds of questions to make sure that
11 they're fair and they address the points correctly and
12 they're understandable. That took a lot of time.

13 Well, what Mr. Wechselberger does, he
14 comes back at the end and says, Well, what Dr. Jones --
15 when he was supplying his technical input to those
16 surveys, what he did, what he says are the alternative,
17 those aren't the alternatives he should have used. He
18 ignores that other potential alternatives exist -- and
19 this is where it even gets more interesting -- some of
20 those -- some of which would be less burdensome on Apple
21 and its customers.

22 So, Apple has refused not only to tell us
23 what alternatives they have, not tell us what the best
24 ones are, and not tell us what the cost or acceptability
25 is, but now their guy in rebuttal is saying, I've got

1 ones that would be much better to Apple. And, Oh, by
2 the way, Apple still won't give us the discovery. Says
3 that again, same point. But, basically, there are less
4 burdensome changes -- less burdensome changes that could
5 be made to iTunes ecosystem that wouldn't infringe.

6 Now, in the briefing -- Apple did not
7 file a sur-reply on this. They filed a -- they did file
8 their response. Their response I think -- there's
9 something that's revealed, I think, in the -- in the
10 structure of the response. One of the points we had
11 made is that this is improper rebuttal.

12 I honestly -- I don't think you -- I
13 don't think the Court needs to get to the issue of
14 whether this should have been in a burden report or in a
15 rebuttal report. I don't -- I don't know that that at
16 the end of the day has to carry the day, because the
17 point is there are Federal rules that say you don't get
18 to not tell somebody in discovery and then come up and
19 cross-examine someone and put it in at trial.

20 But what's interesting is Apple's whole
21 brief is about whether it's proper rebuttal or not.
22 They don't say whether this is discoverable information
23 that you were able to ask an interrogatory about or ask
24 a 30(b)(6) about, because it plainly is. It's plainly
25 discoverable information as to their contentions.

1 So, what -- what we did is we've gone
2 back and looked at what are these things that
3 Mr. Wechselberger introduces, because what Apple's
4 trying to do is say, Well, gosh, we never could have
5 identified this stuff before. It's just -- it's just
6 impossible. It's just plainly not true.

7 Mr. Wechselberger says, For example,
8 similar to the iTunes session model, content can be
9 provided to a user on credit with payment and payment
10 validation to take place at a later time.

11 Is that okay with the studios? Is
12 Paramount cool with that? Is Disney okay with that?
13 You can have everybody download Frozen and see if they
14 can pay for it later. I don't know. But you know what?
15 Wasn't able to go ask anyone at Apple about that, wasn't
16 able to see what their -- their contracts are about
17 that, wasn't able to investigate whether that's even --
18 even a possibility.

19 Similarly, although they say we are
20 rebutting what Dr. Jones pointed to as payment
21 information, they've got this other allegation which --
22 subtle difference. For example, rather than reading
23 payment distribution information from a data store, this
24 information could be manually input by Apple prior to
25 distributing royalties to content owner.

1 So even though Dr. Jones was testing --
2 was testing some issues related to payment data that
3 might go from your iPhone to the iTunes store, they're
4 now saying, Well, one thing we could do that's totally
5 unrelated to that is back at the back end, when it comes
6 time for Apple to pass on the revenues to all the
7 different app guys, the thousands and thousands and
8 thousands of app guys, we can just do all that by hand
9 entry. That's something we could do.

10 And then also in another example, rather
11 than allowing users to download apps from the app store,
12 Apple devices could just be preloaded with some number
13 of the most popular apps, like 10 or 20 of the most
14 popular apps.

15 Who's going to pay for that? Are they
16 passing that along to the consumer so the phone price
17 goes up? Is Apple just going to pick that up and
18 reimburse the app guys? Are the app guys cool with
19 that? Are users cool with having that memory taken up?

20 I don't know. Never got to ask Apple.
21 But not one of those is something Apple couldn't have
22 told us about during discovery and let us go -- let us
23 go investigate.

24 And at the end of the day, if we boil it
25 down, how -- how is it in the American legal system

1 where you have discovery to avoid this sort of thing
2 that Apple would be allowed to testify about this or
3 criticize our survey and our technical expert saying,
4 Here's stuff you should have testified that we refused
5 to tell you about? That's really where we get super
6 harmed on this.

7 And as I'm saying, there's other
8 examples, just things like you could download the
9 content. You have it on your phone, but you can
10 actually only play it when you have an active Internet
11 connection. So, you can download it but you can't play
12 it on the subway if you're in New York, or play it on an
13 airplane. You got to have an active Internet
14 connection.

15 Again, we didn't get to investigate
16 whether the marketing guys would be real happy with
17 that, the music you can download but can't play during
18 your commute.

19 So, remember, we're not talking about a
20 case where it's some third party's nobody took discovery
21 at the end of discovery might do. It's Apple's
22 expert -- paid expert saying what would be okay with
23 Apple and not burdensome to Apple, but Apple never --
24 never has addressed it.

25 And the Court is going to be familiar

1 with this, Rule 37. There -- there are consequences
2 when you withhold something in the discovery, and I
3 won't read all of Rule 37(c)(1), but if a party fails to
4 provide information or identify a witness as required by
5 26(a) or (e) -- and 26 (e) is about supplementing
6 interrogatories and what not -- the party is not allowed
7 to use that information or witness to supply evidence on
8 a motion, at hearing, at trial, unless the failure was
9 substantially justified or is harmless.

10 Their failure is not justified and it's
11 certainly not harmless. I think those two things I
12 won't repeat. There are other sanctions that the Court
13 could give in lieu of those. There's other things the
14 Court can do like pay expenses or inform the jury of the
15 party's failure or other appropriate sanctions.

16 I mean, I think in this instance -- as I
17 say, we're not seeking to strike everything that
18 Mr. Wechselberger did or all the criticisms of all of
19 our experts. But in this instance, this one, I think
20 the appropriate sanction is -- or the appropriate result
21 is simply to say, Hey, guys if you're not going to
22 disclose what you yourself, your company could do -- and
23 they've never claimed privilege over it, not once.
24 That's not the issue. But if you're not going to
25 disclose it, you can't come back and use it to throw

1 stones when it comes time for -- for trial.

2 So, I'm trying to figure out why Apple
3 thinks they don't have to actually provide discovery on
4 it. And it's not actually clear, but the best I can
5 understand as to why Apple says they didn't have to
6 provide discovery on it is because they say they don't
7 actually care whether any of these alternatives their
8 expert is pointing out are even available. They don't
9 actually care about that. It doesn't matter if it's
10 something you could actually do.

11 And this -- I'm looking to this part of
12 their response brief. It's at page 3. Apple has not
13 argued in it's expert report, summary judgment briefs,
14 or Daubert motions that the availability of a
15 non-infringing alternative is a factor that should
16 result in lower reasonable royalty. Apple has not
17 suggested that the availability of non-infringing
18 alternatives is a factor that should be considered at
19 all during hypothetical negotiation for determining a
20 reasonable royalty rate. Absent such a contention,
21 there is no burden on Apple to postulate non-infringing
22 alternatives for Smartflash's experts to then use to
23 create a survey.

24 And maybe I'm reading this wrong, but
25 what is crystal clear to me is it may just be that Apple

1 is saying, well, we didn't have to put it in our burden
2 report. But as to whether there was no burden to
3 provide it, the Federal Rules of Evidence -- or -- I'm
4 sorry -- Federal Rules of Civil Procedure as to
5 interrogatories and 30(b)(6) depositions say -say
6 otherwise.

7 So -- and finally 23, I mean, if their
8 point really is that, We don't have to give you this
9 information because who cares if the alternative is
10 actually available, why would we have a trial where our
11 experts are being criticized for not considering
12 something that's even available, even an alternative? I
13 don't -- I don't get it.

14 But I think that point is sort of
15 irrelevant because there was a valid discovery request
16 requesting discoverable information that just was no --
17 was not answered without explanation, no mention of the
18 30(b)(6) topic that we had out, no mention in the
19 response of the letter that I could -- that I recall
20 anyways.

21 And at the end of the day, Apple just
22 tries to say, Well, it's surprise, because we learned
23 in -- we learned for the first time in Dr. Jones'
24 report -- Smartflash disclosed its position that options
25 like streaming content would not infringe at least some

1 of the asserted claims. And I have highlighting,
2 obviously, to help streamline the reading. Your Honor
3 is welcome to read all of it.

4 They also -- one of the parts that's
5 not -- that's not highlighted -- I will say another
6 alternative -- like they learn that manually entering
7 payment information into a website is outside the scope
8 of the asserted claims. I cannot conceive how they
9 learned of that for the first time in an expert report.
10 That has never been accused of infringement of these
11 claims. Like, oh, you're buying something on your
12 iPhone. Hold on. Let me go over here to a website
13 and -- and do my payment separately. That's never been
14 accused. They didn't learn that in -- in Dr. Jones'
15 report.

16 And as to the position that streaming may
17 not infringe some of the claims, that's been crystal
18 clear since day one. Apple in its brief says, But --
19 but they accused AppleTV second and third generation
20 that stream.

21 Well, yeah. It's always been the case
22 that that was accused as to some but not all. Even the
23 claim they point to -- '720, Claim 1 -- mentions this
24 AppleTV. But the next one -- the next independent
25 claim -- '723 in our contentions -- does not accuse it.

1 Same as when you get in the allocations -- allegations
2 of that claim, '720, Claim 1 accuses that AppleTV
3 functionality, '723 doesn't. Nor does 95 percent of the
4 asserted claims even -- were they ever asserted in
5 streaming.

6 And one of the -- I think maybe the only
7 other one that is, although I don't want to misrepresent
8 that to the Court, '772, Claim 5. Which is just a
9 little dependent claim, before we have the construction
10 for supplementary data we had said supplementary data
11 must be streaming content. That's -- to my knowledge, I
12 think that's the only time we actually even referred to
13 streaming is in one dependent claim of one of the six
14 patents in our contentions.

15 So, acting as though Apple has suddenly
16 realized through Dr. Jones' opinion that streaming does
17 not infringe all claims, I can't really reconcile that
18 with reality. I think what it is, is just a post-doc
19 explanation for why -- why they never gave us any sort
20 of discovery.

21 I've already been through this, but
22 basically these things they say he learned about
23 streaming and manually entering payment information,
24 they didn't just learn them. And those things don't
25 justify the new alternatives that Mr. Wechselberger put

1 out.

2 So, in conclusion, I think it's pretty
3 telling that Apple focuses on the sequence of reports,
4 not on what they didn't do during fact discovery. And I
5 think they're just flat wrong on the discovery side of
6 it. I mean, they didn't really address -- didn't
7 provide information. But, in any event, they chose not
8 to. It was tactical.

9 And I'll remind the Court, we would
10 have -- I mean, we -- we take quite seriously bringing a
11 motion to the Court. And there was months of -- I think
12 a month or two of meet and confers with Samsung before
13 we ever brought the first one, and then there were more
14 problems before we brought the second one.

15 We've had a good rapport with Apple's
16 counsel, and we negotiated this for a long time. And we
17 absolutely would have moved on it but the problem is the
18 letter. The letter doesn't say, I'm standing on an
19 objection because I think it's not discoverable. It
20 says, We don't have an alternative.

21 And at some point, you've got to be able
22 to rely on discovery without just the sneak attack that
23 says, I know we didn't tell you about it, but here's
24 something else we could have said and didn't.

25 So, in conclusion, not all of

1 Dr. Wechselberger's report but the non-infringing
2 alternatives that he adds in his rebuttal report should
3 be stricken so that that criticism can't be made by him
4 and nor should it be levied on Dr. Jones or Dr. Wecker
5 in cross-examination when we weren't able to test them.

6 As a reminder to the Court, it's
7 Smartflash's position that whereas typically things of
8 this nature can be cured, at some point you have almost
9 like an estoppel effect. I mean, if someone represents
10 there isn't something, you do it -- you take actions in
11 reliance. I can't -- I can't cure that now. I mean, I
12 could go get some criticisms of it, but if their guy's
13 allowed to come in and say, Well, here's all the reasons
14 that survey you spent a bunch of money on is flawed,
15 that doesn't really fix my problem.

16 Thank you.

17 THE COURT: Thank you.

18 Response.

19 MR. POST: Got a couple of binders, Your
20 Honor, if I can pass those up.

21 THE COURT: Sure.

22 MR. POST: All right. So just -- just
23 one quick point. I think one of the issues that the
24 parties had briefed is whether Apple had an affirmative
25 burden to -- to present this information in its burden

1 report.

2 I misplaced my clicker.

3 And Apple's position in its response was
4 that that's not the case, that Apple is not
5 affirmatively putting forth alternatives to form a basis
6 for something like a cap on royalties. And the slide --
7 I think it sounds like from Mr. Caldwell's argument and
8 I think the briefing, the way it played out, makes clear
9 that that's not really what the issue is, but I wanted
10 to be clear that Apple's position is that that is not
11 something it had a burden to present affirmatively.

12 It's not something that's underpinning as
13 you'll see and hear in the next series of arguments as
14 this survey issue rolls forward through the various
15 experts, but it was -- it was forming the basis for its
16 own survey for capping its own damages. So I think it
17 sounds like that issue is something that wasn't raised
18 in their reply brief is -- is no longer an issue. I
19 want to be clear on that.

20 So, Mr. Caldwell mentioned that in his
21 perspective, really it's that later point, the
22 undisclosed factual contentions that are the main issue.
23 In their -- in their motion, both the question of
24 whether or not this was an improper rebuttal and whether
25 Mr. Wechselberger's opinions were based on some

1 undisclosed contentions were raised, and I do think that
2 both of those are relevant to the issue.

3 We did in the responsive brief focus
4 on -- in part on that -- the question about whether or
5 not this is improper rebuttal because this is an
6 important question, I think, in the -- the overall
7 context of the motion. And as we'll -- we'll step
8 through those in order if you want both to have some air
9 time, but as you'll see, each of those arguments does in
10 fact fail.

11 So, the parties agreed on -- on what the
12 three-part test was for rebuttal evidence, and I'm not
13 going to spend a tremendous amount of time on this
14 because I think Mr. Caldwell stepped through this.
15 We're generally in agreement, and I think the briefing
16 lays that out.

17 There are three -- three questions that
18 the Court looks at to determine whether or not an expert
19 opinion is improper rebuttal. The first and second
20 questions are really related to one another. Now, the
21 first is, What evidence does the rebuttal expert purport
22 to contradict or rebut?

23 And I think it's important here to
24 remember and keep in mind exactly what it is that
25 Dr. Jones said he was doing in his alternatives

1 discussion. He was laying out for a variety of
2 scenarios what he believed the best alternative was for
3 Apple or its customers in order to form the basis of
4 these scenarios that were ultimately tested in the
5 survey. And those were -- were Dr. Jones' opinions.
6 They were his subjective analysis of something being the
7 best and an alternative.

8 And what Mr. Wechselberger did is -- is
9 challenge that -- question that. Did Dr. Jones apply
10 those two subjected tests consistently across his
11 various scenarios?

12 As Your Honor may be familiar, there
13 are -- I think there are about 13 different scenario
14 alternatives that were used in the survey, and those
15 focus on different features, different aspects of the
16 accused products. So the question Mr. Wechselberger was
17 asked was, you know, are those consistent, were they
18 consistently applied. And we'll -- we'll talk about
19 that in a minute.

20 But as to whether or not what the focus
21 of the rebuttal opinion is, it's on those alternatives
22 and whether in fact they are the best.

23 THE COURT: But aren't they -- aren't
24 those statements contrary to Apple's position during
25 discovery of we don't have any non-infringing

1 alternatives? I mean, that's what's troublesome.

2 MR. POST: So, I think the question --
3 and Mr. Caldwell focused on Topic 164 of the 30(b)(6)
4 notice. You know, that -- that focused on really what
5 the cost and acceptability of alternatives was.

6 You know, I think if -- if Apple were to
7 come forth and say some alternative would be beneficial,
8 would be less expensive, could be implemented at some
9 small cost, and that should be a cap on damages, that
10 may be a different question, but that's not what's --
11 what's at issue here is not what Apple has done in the
12 rebuttal expert report.

13 THE COURT: Okay. But the common
14 interrogatory says, Identify and describe what you
15 contend is your best alternative to infringing
16 Smartflash's patents. And your response ultimately was,
17 We don't have one.

18 MR. POST: Sure.

19 THE COURT: And now you've got an expert
20 saying, Yeah, there are these others.

21 MR. POST: Sure. So let's -- let's
22 actually jump ahead. I think that the slides are clear
23 and doesn't sound like we have a dispute on whether or
24 not this is improper rebuttal as a matter of law. If we
25 want to go back to that, certainly happy to, Your Honor.

1 But jumping ahead to the question about
2 whether or not this is in fact an undisclosed factual
3 contention, respectfully, when Apple was accused of
4 infringement for the first time in the case, AppleTV was
5 one of the accused products. I don't think that's
6 disputed.

7 And there are claims for which in the
8 initial preliminary infringement contentions, AppleTV
9 devices that solely stream content were accused of
10 infringement. So, faced with those contentions, it's --
11 it's Apple's position that that -- the belief that
12 streaming content, its streaming functionality was
13 accused was a reasonable belief based on those
14 contentions that -- that Apple was seeing and had been
15 accused of infringing based on.

16 It wasn't until Dr. Jones in his opening
17 expert report said, not streaming -- it's non-infringing
18 and it's an alternative that -- that one could use. The
19 issue is taking that streaming example, he then applied
20 it inconsistently between some of these alternatives.

21 And that's what Mr. Wechselberger was
22 responding to, that if streaming is not infringing,
23 that's your position? It doesn't infringe.

24 It should be an alternative anywhere
25 streaming content could be employed. And that's what he

1 did when he stepped through each of those alternatives
2 and say, well, you know, you say streaming's
3 non-infringing, well, it could be an alternative for
4 this particular alternative.

5 So, at the time in discovery when asked
6 whether it was the common rog, whether it was the
7 specific Rule 30(b)(6) deposition topics, it was Apple's
8 position. And, you know, my name was at the bottom of
9 that letter and I stand by what we said at the time.

10 Based on the contentions -- the breadth
11 of the contentions that we were facing, Apple did not
12 have any contentions about what would be the best
13 alternative for practicing those claims.

14 And it's not just the streaming context.
15 We also talked about payment information. Again, this
16 is a screen shot from Smartflash's preliminary
17 infringement contentions. An example of payment
18 information that's input into -- you can see here this
19 is the iTunes' client on I believe -- I know it's
20 device. What's presented there is essentially a web
21 page.

22 Again, this is what Dr. Jones now says is
23 an alternative, what he contends is the best alternative
24 for practicing certain of the claims. This was their
25 infringement contention. So, again, faced with a

1 contention like this -- a broad contention like this in
2 discovery, that was Apple's position that no
3 alternatives had been identified, and we stand by that.
4 Based on that, that was Apple's belief during discovery.

5 Now, Dr. Jones presents his opinions and
6 Mr. Wechselberger responds to those. And just stepping
7 back to -- I think it is relevant to this point.

8 Turning to the -- the question about rebuttal evidence,
9 one of the cases that Smartflash cites is Tramonte v.
10 Fibreboard case. It's a 5th Circuit case from 1991 and
11 its dealing with fairness.

12 Is it fair for a party to face something
13 new in a rebuttal that they have no opportunity to
14 respond to. I think it's important for this case to
15 know what exactly the -- the chronology of events were.
16 The Court was considering a request to admit that
17 certain deposition testimony in the rebuttal phase of
18 the case. So this wasn't rebuttal report. This wasn't
19 defendant's case in chief where some information was
20 coming out. This was literally in the rebuttal, and it
21 was information that had been attempted to be introduced
22 in plaintiff's opening case. Court denied that.

23 There, the Court was concerned that
24 there's no further opportunity to consider that evidence
25 to have responsive evidence submitted and there's --

1 there's prejudice there. That isn't the case here.

2 Mr. Wechselberger put forth in his
3 rebuttal report his opinions about whether responding to
4 Dr. Jones' opinions, they have been applied
5 consistently, whether they were truly the best
6 alternatives available. So best alternatives, period.
7 And Dr. Jones submitted a supplemental expert report
8 responding to those, so he himself had the opportunity
9 to respond.

10 Both experts have been deposed in the
11 case. Presumably at trial, Dr. Jones will submit during
12 plaintiff's opening his belief as to the -- the best
13 alternatives. Mr. Wechselberger will have the
14 opportunity to respond in Apple's case in chief, and
15 then the rebuttal phase presumably, if Smartflash wishes
16 to, expect that Dr. Jones could -- could revisit those
17 opinions in -- in the rebuttal phase.

18 So, respectfully, we believe there's
19 no -- no prejudice here and that nothing untoward has
20 been done to Smartflash. Thank you.

21 THE COURT: All right. Mr. Caldwell, I
22 would like to hear your response on the notion that
23 initially some of what are now non-infringing
24 alternative ideas for your expert were infringement
25 contentions. All right?

1 MR. CALDWELL: Okay. One, if that were
2 true, I don't think that could ever be a reason why you
3 don't provide discovery. Because let's be clear,
4 they're saying they couldn't have done it before because
5 they just learned that those functionalities don't
6 infringe all claims.

7 Even if what he's saying were true -- and
8 I want to actually address that in just a second -- even
9 if what he were saying were true, none of that was ever
10 asserted on all claims. It was always the case that
11 some of the asserted claims would not have been met.
12 And that's why -- these alternatives aren't necessarily
13 meant to get around every single claim in the patent.
14 It's just various combinations.

15 So, I think it's actually missing the
16 point because a lot of those things were not accused on
17 all claims from the beginning, which is the very basis
18 they raise now as to what -- what their shock and
19 surprise was.

20 Two, if -- in discovery you have to allow
21 for the possibility -- I mean, for example, they have to
22 answer a non-infringing -- a non-infringement
23 interrogatory, right? You have to allow yourself for
24 the fact that things are going to evolve throughout the
25 case, and they should have answered the discovery

1 because if they contend that one of things doesn't
2 infringe, they need to say, I don't think streaming
3 infringes and here's also another alternative.

4 But more to the point, I actually want to
5 address whether what Mr. Post said -- I'm not suggesting
6 he's -- he is misleading the Court, but let's -- let's
7 be clear. He said the way you know streaming was at
8 issue in the infringement contentions is because there
9 were acquisitions against AppleTV, second and third
10 generation, which I think streams stuff. There are
11 still allegations against AppleTV second and third
12 generations. I think it's '317, Claim 18. That's still
13 in Dr. Jones report.

14 So it was always only in some. It is
15 still only in some. That hasn't changed. And, we never
16 said you infringe by going to a website and entering
17 payment information. What that slide is talking
18 about -- and Mr. Hamad is going to stand up and call me
19 a liar if I'm wrong about this because I'm just -- you
20 know, unless we -- we said something that is not what I
21 remember it to be. Because that wasn't in the briefing.
22 That is new to me.

23 What that slide is talking about is that
24 when you first register your Apple ID, you set up an
25 account back on the server that is going to be able to

1 bill you. Our allegation as to what is the payment
2 information has been, always been when you go, you say
3 you want to buy your app, you enter your Apple ID and
4 that -- a representation of that is sent.

5 So, it's not that they said you guys are
6 actually accusing just -- all you do is you go and -- go
7 separate to a website. We were always accusing that
8 when you buy, you -- you do your Apple ID. And so, I
9 don't doubt that that slide's in our contention. I
10 mean, we have like 8,000 pages worth of contentions for
11 Apple with the various claims and whatnot. I don't
12 doubt that that's in there. It's not that what we've
13 done is we've made an about face on our -- on our
14 payment allegation. It's always been that you send your
15 Apple ID.

16 So, also -- Mr. Hamad, do you have my
17 slide that showed -- it's about number 5? It's the one
18 that shows the 30(b)(6) topics. It may be right before
19 that. Number 4.

20 When Mr. Post characterized, Oh, it's
21 okay. We didn't necessarily have to answer number
22 164 -- and there was a reason I directed you to that
23 one. It doesn't say just the cost and acceptability of
24 non-infringing alternatives. It says any alleged
25 non-infringing alternatives to the invention claimed by

1 patent-in-suit and the cost and acceptability of those.
2 So, I don't know that this point may have gotten lost in
3 his argument. I'm not sure -- I don't think he was
4 trying to misrepresent the topic, but that topic
5 absolutely would get at what is -- what is at issue
6 here.

7 And finally, just to be super brief -- do
8 you mind if I show your slide 11, Mr. Post? It's fine
9 if we can switch over?

10 MR. POST: That's fine.

11 MR. CALDWELL: This really gets to the
12 heart of this issue. I'm looking at Mr. Post's slide,
13 slide 11. If we look at the last bullet points, But
14 here, Smartflash faces no risk, as Dr. Jones can address
15 Mr. Wechselberger's opinions in Smartflash's rebuttal
16 case, if he so chooses.

17 How does that help with my survey, right?
18 I have -- I have invested a lot. The client has spent a
19 lot investing in this survey that we ran in reliance we
20 don't have alternatives. And so, now a guy gets to come
21 up and sling mud and their response is, Well, it's cool
22 we got to sling our mud. You can come back and say why
23 some of that's wrong.

24 One, that's problem enough and for that
25 reason it should be -- it should be granted, the motion

1 should be, because we can't deal with the survey aspect
2 of it, even if Dr. Jones can get into a technical fight.

3 But more to the point, Dr. Jones can
4 address his opinions. How? They're still not telling
5 me the cost, the availability, how this thing would
6 work, whether their contracts would permit it. So my
7 guy's supposed to say, Yeah, based on precisely no
8 information, I think your stuff is wrong.

9 I mean, he has been able to infer lots of
10 criticisms about their stuff. And we've tried. Okay?
11 We've tried. But suggesting that it's -- everything's a
12 level playing field here and Dr. Jones can come up in
13 rebuttal while, We're still not telling you the facts of
14 this, and just after they've already disparaged the
15 survey, that he can fix that on rebuttal, that doesn't
16 cure it.

17 And that -- I think the fact that that's
18 what Apple has to go to to say there is no risk to
19 Smartflash, it just basically illustrates my point as to
20 why granting the motion is really the only solution.

21 MR. POST: Just a very brief response,
22 Your Honor. Just -- just three quick points that
23 Mr. Caldwell mentioned. It's not our contention that
24 all claims had to be accused of infringing a certain
25 feature for there to be an alternative. I believe that

1 Dr. Jones in his report was focusing on particular sets
2 of claims. At least that -- at least as to the claims
3 that for which AppleTV was asserted. And remember, the
4 AppleTV assertion was that -- that that remote device,
5 that that server component that was the data carrier
6 from which content was being retrieved, that's certainly
7 a reasonable position to understand that streaming
8 was -- was --

9 THE COURT: What about as to the rest of
10 the claims where you provided no response to direct
11 questions in discovery?

12 MR. POST: Right. Well, I think as to
13 those other claims even Dr. --

14 THE COURT: I said that wrong. Not no
15 response. The response is None, which is different.

16 MR. POST: Right. I think Dr. Jones'
17 opinions about what alternatives existed weren't based
18 on any particular set of claims in his report. I think
19 during his deposition he did clarify that as he was
20 going through those, he did consider claim here and
21 claim there to be part of that opinion. And that's what
22 Mr. Wechselberger responded to.

23 So, for those claims to which streaming
24 could be a -- an alternative to which Dr. Jones applied
25 in one case and not in another, that's what

1 Mr. Wechselberger was doing. Not saying that as to some
2 other set of claims that now streaming was available to
3 those. The focus is on Dr. Jones' set of claims for
4 each of those.

5 THE COURT: But the real prejudice here
6 is the notion of Dr. Jones made those statements relying
7 on the fact that you had said, No, there are no
8 non-infringing alternatives. And they did these
9 expensive surveys based on that knowledge. And now
10 we're here at the report, and now in response, Oh, yes,
11 there is a non-infringing alternative, that's something
12 that if it was going to be relied on by your expert, it
13 should have been disclosed.

14 MR. POST: Well, this isn't a
15 circumstance where a new set of alternatives that as
16 Apple's presenting as saying, Well, these could be done
17 and they're less expensive. And, Look, here's --
18 78 percent of customers would say, Yep, that's the best
19 thing that I would pick. That's not what -- what's at
20 issue here.

21 What's at issue here is whether or not
22 the alternatives that Smartflash chose to test were
23 consistent internally. But that what Dr. Jones, based
24 on his understanding of the way the products worked and
25 the way users interact with them, that that -- what he

1 was saying was, Okay, I'm going to remove that feature,
2 I'm going to change that feature, but somewhere else I'm
3 going to tweak the feature, I'm going to say you can do
4 it rather than remove rentals as an option.

5 So -- let me just clarify it this way.
6 One of the alternatives that you'll hear about is a
7 circumstance where the ability to rank content is
8 eliminated. Now, elsewhere he concludes that you can
9 stream certain things and that would be an acceptable
10 alternative.

11 Why didn't he apply it to that first
12 example where rentals were saying being removed rather
13 than simply being streamed? And that's all
14 Mr. Wechselberger's response rebuttal opinion was
15 focused on for that particular example. So, stream it,
16 don't remove it.

17 We're not saying that streaming it would
18 come at some cost and that that should be a cap on
19 damages. Again, that's not what the focus of -- as
20 you'll hear as you go through the -- the survey and
21 ultimately the damages experts. That's not what's at
22 issue. The question is whether Dr. Jones, who sits at
23 the base of all of this, the alternatives that he's
24 picked out and said he believes are the best
25 alternatives, whether or not he's applied that -- that

1 logic consistently. And that's really a fairly narrow
2 response that Mr. Wechselberger has. It's not that for
3 some other area Apple believes that a -- an available
4 alternative at some low cost exists.

5 One other point that was made that didn't
6 appear in the briefing was that Dr. Jones shouldn't be
7 cross-examined on his opinions about whether or not
8 certain things are best alternatives. I respectfully
9 disagree to the extent Dr. Jones is expressing opinion
10 as an expert, that he believes the subjective things are
11 in fact best alternatives, that he should certainly be
12 subject to cross-examination on that. And we don't
13 believe that -- that any sort of request of sanction or
14 otherwise preventing that from taken place to be
15 appropriate.

16 That's all I have.

17 THE COURT: Okay. Any final word, Mr.
18 Caldwell?

19 MR. CALDWELL: I think Your Honor has a
20 real good handle on -- on what happened here and what
21 the prejudice is. I'm not suggesting that they can't go
22 cross-examine Dr. Jones on things that would be just
23 fair cross-examination in the ordinary course, but you
24 can't -- I don't think you can come back and be like,
25 Isn't it correct that they could do this change and this

1 change and this change and that would be less burdensome
2 and there'd be -- I mean, the things that they should
3 have told us in the interrogatory.

4 But as to the other thing, I think the
5 plain -- I think the harm to Smartflash is plain, and it
6 just can't be fixed by having our guy come back on
7 rebuttal and not being able to explain effectively to
8 the jury what -- what happened because they've withheld
9 all this information, and they're still withholding it.

10 MR. POST: Just, respectfully, Your
11 Honor, on cross-examination point, Dr. Jones set forth
12 his opinions about these best alternatives. We should
13 absolutely be allowed to examine him on whether or not
14 those opinions were correct, consistent, and applied
15 consistently. Thank you.

16 MR. CALDWELL: I'm sorry.

17 MR. POST: I won't stand up again, I
18 promise.

19 MR. CALDWELL: He's aware there's a
20 letter that says we haven't identified any alternatives.
21 So, I -- he -- he tried to come up with alternatives,
22 like, to help out and put himself in the shoes of them
23 so we'd have things to test against.

24 And as I say, I mean, I don't know if
25 these things are amenable to perfect delineation in a

1 hearing, but the point is I -- whatever you could cross
2 him on just -- it's normal cross-examination of his
3 opinion I think is fair game.

4 My problem is something that you should
5 have disclosed, and you can't come in and have -- like,
6 for example, you couldn't have your corporate
7 representative come in and go, You know what we'd like
8 to do? This would be a less burdensome alternative.
9 We'd like to do this. And then, Aha, Dr. Jones, you
10 didn't take that into account.

11 I mean, that sort of thing would be just
12 fundamentally unfair. And having their expert come up
13 and throw stones would be just fundamentally unfair.

14 THE COURT: All right. We are going to
15 take our lunch break, and I will come back this
16 afternoon but only until 5:00. So, we've got still a
17 lot of ground to cover and I want you to talk over lunch
18 and see about how we can make sure that we can get it
19 all covered by the end of the day.

20 All right. We'll be in -- we'll be in
21 recess until 1:15.

22 (Recess.)

23 THE COURT: Hello again. Please be
24 seated. All right.

25 MR. VERHOEVEN: Your Honor, Mr.

1 Verhoeven. We have conferred amongst the parties, as
2 you instructed, over the lunch break. Given the limited
3 amount of time available -- I thank you for telling us
4 how long we had -- the parties have reached an
5 aspirational agreement to try and use equal amounts of
6 time, which would be, roughly, 90 minutes each.

7 And so you can see sort of a road map of
8 where we're going, these are going to be much shorter
9 arguments, obviously, and what we're going to try to do
10 is for the first half of that time period focus on the
11 Daubert-related motions, evidentiary motions, and then
12 with the second half, we intend to focus on the
13 merits -- remaining merits-based motion such as
14 invalidity, willfulness. Game Circus has their own
15 motion. That'll be in that second trounce, Your Honor.

16 THE COURT: Okay. All right. And then
17 right before we adjourn today, I want to talk to you-all
18 just logistically about drawing a district judge, all of
19 the things we need to do to get the cases ready for
20 trial, so...

21 MR. VERHOEVEN: Great. Thank you, Your
22 Honor.

23 MR. CASSADY: Before we get started, Your
24 Honor, one... On the break, Ms. Baily and I discussed
25 the sealing issue, at least for the next part of this

1 day, and I think -- I'm under the impression that
2 everybody here is either in-house or a lawyer for
3 somebody that's in this case, other than Google, and
4 that's Ken Maikish -- Maikish and he is the gentleman in
5 the back. He's for Google.

6 Obviously, we have a case against Google
7 as well. We're happy for him to be in-house counsel
8 that's aware of the issue that we're all talking about,
9 so I guess what I'd say is as long as everybody in the
10 room understands we're not talking about this outside of
11 this room except for with each other, then we're okay
12 with just, you know, going forward with the case as long
13 as more people don't come into the courtroom during the
14 afternoon.

15 THE COURT: Okay. That sounds like a
16 good agreement.

17 Ms. Baily.

18 MS. BAILY: That's our understanding just
19 so that you know this doesn't preclude us from
20 contending later that nothing here is confidential, but
21 for purposes of today that's our agreement.

22 THE COURT: Okay. And -- and if you-all
23 just help me keep a watch on the door. If you see
24 someone you don't recognize, just stop me. Okay.

25 All right. Let's get started.

1 Mr. Nelson [sic].

2 MR. NEMUNAITIS: Good afternoon, Your
3 Honor. Justin Nemunaitis for Smartflash. The next
4 issue is Smartflash's motion to strike Apple's damages
5 expert Dr. Stephen Becker.

6 In this case, both sides damages experts
7 agree that reasonable royalty damages should be
8 calculated as the result of a 2008 hypothetical
9 negotiation between Apple and the inventor Patrick Racz
10 who owned the patents at the time.

11 Apple's damages expert Dr. Becker, when
12 he tried to perform that calculation, he doesn't look at
13 the value that the patents provide to the specific
14 accused products. He doesn't look at the importance of
15 the technology to Apple's customers, he doesn't consider
16 Apple's profit margins, and he doesn't conduct his own
17 survey to see how important this technology is to
18 Apple's customers.

19 Instead, what he does is he imagines what
20 would have happened if Mr. Racz -- if instead of
21 inventing a new technology and try to build his own
22 business he had taken that money that he used towards
23 creating his new technology and instead invested it in
24 the stock market or a hedge fund or some other type of
25 investment vehicle.

1 He then takes that number adjusted by
2 Apple market share for MP3 players and smartphones and
3 he calls that a reasonable royalty. This approach has
4 no connection to the technology at issue in the case.
5 It has no connection to the specific accused products.

6 If he's allowed to tell the jury that
7 this is an acceptable way to calculate reasonable
8 royalty damages, it would be extremely prejudicial to
9 Smartflash.

10 Now, there's no dispute on the law that
11 needs to be applied in deciding this motion. Section
12 284 states that upon finding for the claimant, the court
13 shall award the claimant damages adequate to compensate
14 for the infringement, but in no event, less than a
15 reasonable royalty for the use made of the invention by
16 the infringer.

17 The issue for this Daubert motion is
18 whether or not Apple has met its burden of showing that
19 Dr. Becker has provided testimony that will assist the
20 jury in deciding what is a reasonable royalty based on
21 the use made of the invention by Apple and whether or
22 not he's applied or relied on methodology to get there.
23 And Apple can't meet either of those burdens.

24 I'm going to walk through briefly
25 Dr. Becker's overall methodology and point out problems

1 with it along the way. He employs three basic steps;
2 first, he calculates the negotiating range from
3 100 percent of the value of the patents, then he adjusts
4 that range based on a market share estimate, and then he
5 selects a final royalty within his final adjusted range.

6 Now, right off the bat this should raise
7 a red flag. Dr. Becker claims not just that he can
8 determine the outcome of a hypothetical negotiation
9 between Mr. Racz and Apple, but he can actually
10 calculate the value -- or 100 percent of the value of
11 the patents-in-suit to any company that might
12 conceivably want to use the technology.

13 Now, both sides cited a lot of different
14 cases in the briefing and neither one dealt with this
15 issue of an expert taking on this sort of extreme
16 project, so I can't say as a matter of law that the
17 Federal Circuit's looked at this issue and it said
18 that -- there's just no way to calculate 100 percent of
19 the value of the patent.

20 But certainly, based on the amount of
21 rigor that they require for a two-part hypothetical
22 negotiation, I mean, this is a very extreme task that
23 Dr. Becker's undertaking.

24 Now, the way he goes about trying to
25 calculate this 100 percent value negotiating range is

1 not by trying to define the market sort of in a lost
2 profits type of way and seeing how this technology is
3 used in different projects; instead, he just looks at
4 two e-mails that were sent by inventor Patrick Racz, and
5 to understand why he selected those two e-mails is
6 helpful to very quickly walk through the history of
7 Smartflash.

8 At a very high level, in 1999, Mr. Racz
9 filed initial patent application for the technology.

10 Over the next few years he tried to develop and
11 commercialize that technology, and he ended up
12 negotiating and signing deals with companies like
13 Disney, Viacom, Britney Spears for content, and he
14 negotiated a deal with Gemplus to assist in
15 manufacturing actual products that would practice the
16 technology.

17 Unfortunately, things went wrong in 2003.
18 Gemplus started developing a competing product without
19 his knowledge, and the company filed in 2003.

20 Fast-forward seven years later, his first patent finally
21 issues on his original -- on his patent application, and
22 in 2010 he signed a deal with his current business
23 partners to inject new capital into his business.

24 Dr. Becker focuses on e-mails that were
25 sent during this 2003 to 2010 time period when Mr. Racz

1 was trying to drum up support and reinvigorate the
2 business. The first of those e-mails he relies on is a
3 2009 e-mail sent from Patrick Racz to a potential
4 investor named Jeff Ronaldi.

5 And there's one sentence in that e-mail
6 that after Mr. Racz walks through the history of
7 Smartflash, at the end, he says, Look, my intention in
8 sending you this e-mail is that I want to make a return
9 on the investment that I've made.

10 Dr. Becker looks at that statement and
11 says, Okay. Well, Mr. Racz, I'm going to assume he
12 invested about \$3 million in the venture, so I think a
13 fair rate of return would be \$5.1 million.

14 This is good evidence that Mr. Racz would
15 not accept less than \$5.1 million for an industry-wide
16 license to his patents. He calculates the upper bound
17 on his range by looking at a very similar e-mail sent to
18 a group of potential investors associated with a company
19 called Celebrity Kiss.

20 And in that e-mail, Mr. Racz states, My
21 intention in saying -- this e-mail said, I'd like to
22 make a substantial ROI over the life of any granted
23 patents. And based on that e-mail, Dr. Becker concludes
24 that the maximum amount that Mr. Racz would accept for
25 industry-wide license is around \$20 million.

1 Now, there's again some big red flags
2 with this approach. First, this is all the evidence he
3 relies on to calculate this initial negotiating range
4 for what would effectively be an industry-wide license.
5 He doesn't consider who the market players are in the
6 license. He doesn't consider how many products are
7 sold. He doesn't consider how the technology is used in
8 those products.

9 It doesn't matter if one infringing
10 product will be sold or billions of products will be
11 sold. It doesn't matter if the patented technology
12 covers an insignificant feature that no one has ever
13 cared about or if it covers the entirety of the iPhone.
14 His range stays the same.

15 The complete disconnect between what he
16 claims is 100 percent of the value -- or the negotiating
17 range for 100 percent of the value of these patents and
18 how the technology is actually used is completely
19 contrary to what section 284 requires.

20 The other major problem is that there's
21 just no fact support for his conclusions. He takes two
22 sentences that are almost identical and draws completely
23 opposite conclusions from them. On the one hand, he
24 says that he's established a minimum based on the
25 sentence for Mr. Racz. On the other hand, he says that

1 he's established the maximum based on almost the same
2 sentence.

3 And the problems get even bigger when he
4 looked more closely at this 2005 e-mail. In 2005,
5 Mr. Racz had a discussion over the phone with Celebrity
6 Kiss investors about a potential partnership between
7 their two companies, Smartflash and Celebrity Kiss.

8 After that phone call, Celebrity Kiss
9 wrote them back and proposed some terms for this
10 partnership. They proposed forming a new company and
11 dividing up the equity equally among all the investors.

12 With regard to IP, they proposed that
13 Smartflash's IP rights -- that they be repaid
14 150,000 pounds for their IP rights and 50,000 pounds for
15 the Celebrity Kiss IP rights.

16 And finally, they proposed that all
17 parties agree to work on this new venture on a Nil
18 charge basis. It's Mr. Racz's response to this e-mail
19 that Dr. Becker relies on.

20 Now, in response he states that there's a
21 fundamental difference of opinion over the valuation and
22 short/medium/long term consideration of IP from our
23 side. For the avoidance of doubt I'm not valuing the IP
24 in Smartflash at 150,000 pounds, as this represents a
25 fraction of the time and personal funds (in excess of

1 \$3 million) invested over the past 6 years. My
2 intention is to realize a substantial ROI over the life
3 of any granted patents in excess of my own personal
4 investment.

5 There is no statement in this e-mail that
6 he has self-imposed a maximum value on his patents of
7 \$20 million. There's just no support for that critical
8 conclusion that this supports an upper cap on what the
9 negotiating range should be.

10 Even if he had stated in here, You know
11 what, for purposes of this deal with Celebrity Kiss, I
12 think we should value my patents at \$20 million, that's
13 not enough to support Dr. Becker's conclusions because
14 this is simply a completely different scenario from what
15 would happen in a hypothetical negotiation with Apple.

16 This e-mail was written before any of the
17 patents issued, before Mr. Racz knew what claim scope he
18 was going to get out of the Patent Office and before any
19 of the accused products that form the basis of
20 Smartflash's damages claim had been released.

21 There's just no way that Mr. Racz could
22 have predicted that Apple would release the iPhone, that
23 he would get patents covering the iPhone, and that Apple
24 would make billions of dollars by infringing his
25 patents. And because of that disconnect in the facts,

1 Mr. Becker can't support that upper -- that upper bound
2 to his hundred percent negotiating range.

3 And these are the two big problems with
4 his hundred percent value calculation. First, he's just
5 completely untethered from the use made of the invention
6 by the infringer, and second, he lacks factual support.

7 If he cannot sustain this calculation,
8 his entire damages model falls apart, because he starts
9 from this big number and whittles it down to a smaller
10 number, and if he can't reliably calculate this big
11 number, he has no way of reliably calculating reasonable
12 royalty damages for Apple.

13 Now, what argument that comes up in the
14 briefing from Apple is that, Okay. Well, maybe there's
15 some problems with the hundred percent value
16 calculation, but that's okay because Dr. Becker will
17 later adjust that amount based on Apple's market share.
18 But that cannot save his opinions.

19 The Federal Circuit explained that
20 beginning from a fundamentally flawed premise and
21 adjusting it based on legitimate considerations specific
22 to the facts of the case nevertheless results in a
23 fundamentally flawed conclusion. And that makes sense.

24 If you start from the wrong number,
25 26 percent of the wrong number is still the wrong

1 number. I also want to talk about how Dr. Becker
2 adjusts for Apple's market share because there are some
3 problems with that as well.

4 Now, he doesn't define the market for the
5 patented technology. He doesn't identify what specific
6 companies he thinks are using the technology or what
7 specific products are using it or what products get the
8 most benefit out of this technology.

9 Instead, he makes two important
10 assumptions. He assumes that all smart phones, PCs, and
11 MP3 players sold in the U.S. in 2008 infringe, and he
12 assumes that the patents impart equal value to all of
13 those infringing devices.

14 Now, we know that this is not true.
15 There are certain types of products like iPod minis and
16 iPod classics that have never been accused in this case.
17 Those are MP3 players. So we know right off the bat
18 that these assumptions are wrong.

19 But the fact is when we got to this point
20 in the briefing, Apple didn't even attempt to justify
21 these assumptions. They said, Well, look, it doesn't
22 even matter if these are accurate or not. But it does.
23 The problem here is not that Dr. Becker might be off by
24 5 or 10 percent or 50 percent.

25 The problem is, if he hasn't done the

1 analysis to know what the market is for the patented
2 technology, then he has no reliable way of making a
3 market share adjustment. And if he can't complete the
4 second step in his analysis, he can't present a reliable
5 reasonable royalty calculation to the jury.

6 Now, one last point I want to make is
7 that -- another way we can think about this is to
8 consider what's the base and rate that Dr. Becker is
9 using. Now, he doesn't specifically say, Here's the
10 royalty base I'm using. Here's the royalty rate I'm
11 using.

12 But there's only one base of revenue that
13 he considers in calculating a reasonable royalty, and
14 that's the amount of money that Mr. Racz would have
15 made if he had invested in the stock market instead of
16 trying to build his own company and inventing a new
17 idea.

18 With that as his royalty base, there's
19 only one number that he adjusted by -- or multiples it
20 by to get to his final reasonable royalty number, and
21 that's the 26 percent market share number.

22 Now, it's clear that those two values,
23 the royalty base and the rate, they're just not tied to
24 the patented technology, they're not tied to the
25 specifically accused features, and so there's just no

1 way that that can be a reliable way to calculate a
2 reasonable royalty.

3 And for those reasons, we think that
4 Dr. Becker's testimony should be struck.

5 THE COURT: Thank you.

6 Response.

7 MR. BATCHELDER: Your Honor, good
8 afternoon. James Batchelder for Apple. I think maybe
9 the best place to start in light of counsel's comments
10 is at the very end of -- of the binder, which is with
11 the Personal Audio Case, just to set some legal
12 framework. The facts are actually very similar. That
13 was the case involving Apple.

14 The reasonable royalty calculation of --
15 of Apple's -- and it was a defendant -- its damages
16 expert was based primarily on patent owner's previous
17 offer to sell one of the patents-in-suit for \$5 million.
18 The jury awarded \$8 million, and plaintiff filed JMOL
19 motion claiming that Apple's calculation was not
20 sufficiently based on the use that Apple would make of
21 the invention, the Georgia-Pacific Factor 11. And so it
22 said there was insufficient evidence to support damages
23 calculation. And the whole thing was to deny the JMOL
24 motion.

25 And in particular, what Judge Clark

1 said -- and this is in 2011 -- was in analyzing the
2 sufficiency of the evidence, the Court concludes that
3 the jury could and should have given substantial weight
4 to the inventor's 2008 offer to sell the
5 patents-in-suit -- or the patent-in-suit here -- or one
6 of them for \$5 million.

7 This was an offer to sell, not merely a
8 license, and it was the actual patents-in-suit, not
9 merely comparable technology. So, very similar facts
10 here.

11 Let me now step you through those facts
12 and why I think they're analogous. They say that the
13 first 14 pages of the deck that I've handed up are
14 simply the Georgia-Pacific Analysis factors as
15 Dr. Becker stepped through them in his report. And each
16 factor shows the page number in Dr. Becker's report
17 where he first addresses that factor just so you have
18 those bookmarks.

19 But if we can go to slide number 15,
20 please.

21 So, here we have the Priority application
22 filed in October of 1999. Of course, by filing this
23 application, and now in this lawsuit claiming priority
24 to it, Smartflash is representing to the court and
25 everyone else that all the inventions that it's now

1 claimed in the subsequent patents are in that Priority
2 application, so they're all down there.

3 Next slide, please.

4 This clicker is not working, so I'm just
5 going to have to ask you to step through it.

6 Okay. And then we have a 2005 e-mail
7 between Mr. Racz and a potential joint venture partner.
8 And I want to be clear at the outset, this was not a
9 response by Mr. Racz as someone asking for a license.

10 It was someone saying, Let's form a joint
11 venture. We'll get some IP from over here, we'll get
12 your IP, and at the end of the joint venture, once it's
13 formed, the venture will own your IP. So we're offering
14 to buy your IP for 150,000 pounds, about 260-something
15 thousand dollars essentially.

16 So he's responding to an offer to
17 purchase all of his patent rights that are at issue in
18 this case for about 260-something thousand dollars, 150
19 pounds -- 150,000 pounds.

20 And he responds by saying, For the
21 avoidance of doubt, I'm not valuing the IP in Smartflash
22 at 150,000 pounds, as this represents a fraction of the
23 time and personal funds in excess of \$3 million
24 invested over the past six years. My intention is to
25 realize a substantial or ROI -- that is return on

1 investment -- over the life of any granted patents in
2 excess of my own personal investment.

3 So, you have an offer to purchase the
4 patents for 150,000 pounds, and he says, No, what I want
5 is a substantial ROI over the life of my patents. Then
6 we have -- see if this works now.

7 This clicker is not working, so if we
8 could have the next slide, please.

9 MR. CALDWELL: And that's ours.

10 MR. BATCHELDER: So then we have the
11 hypothetical negotiation.

12 And next slide also, please.

13 We have the patents issuing and that
14 would essentially happen at the same time. The first
15 patent issues in February 2008, and the hypothetical
16 negotiation, the parties agree, would have occurred
17 then. And then in 2009, we have another similar
18 document.

19 And can we click on that one, please.

20 So, here in 2009 -- and keep in mind this
21 is after the iPhone has come out, and the iTunes Music
22 Store has been up for many years now -- Mr. Racz is
23 explaining to a potential investor about the history of
24 Smartflash.

25 And he says, We've invested over \$10

1 million of which \$2 million was my own in Internet plc.
2 Then it goes on to say, My intention is to realize a
3 return on the investment I have made. So, what is that
4 investment? We said it's \$2 million.

5 So, before the hypothetical negotiation,
6 before the iPhone issues, before the first patent
7 issues, says I'm looking for substantial return on
8 investment in response to an offer to purchase his
9 patents for 150,000 pounds.

10 After the '720 patent issues and after
11 the hypothetical negotiation, essentially says the same
12 kind of thing. What I'm looking for is a return on the
13 investment I've made, and he specifies what that
14 investment was, which was \$2 million.

15 Now, counsel said, I think, that those
16 are the only things he looked at, but he cited a lot of
17 other evidence. And frankly, it renders his analysis
18 quite conservative.

19 One example --

20 On slide 20, please.

21 -- is this is again in 2009, after the
22 hypothetical negotiation, after the iPhones come out,
23 after the '720 patent's issued, he's talking here with a
24 broker.

25 And the broker says to him, As I

1 mentioned earlier, we are interested in exploring the
2 purchase of the '720 patent.

3 This broker had reached out to would-be
4 purchasers.

5 He says, Offers for this project have
6 come in anywhere between \$50,000.00 and \$250,000.00 so
7 far - of course, every patent is different.

8 And then slide 21 is extremely relevant.
9 And it's consistent with his ROI e-mails, and it's very
10 consistent with what we saw in the Personal Audio Case.
11 Mr. Racz himself is -- is holding out an offer to the
12 world and he's -- he's looking for money.

13 And the offer is a 20 percent -- and this
14 is his own writing -- a 20 percent stake in a company
15 that owns granted U.S. Patent '720 and all future
16 continuations.

17 And what is he asking for that 20 percent
18 stake? \$200,000.00. Well, if you normalize 20 percent
19 to 100 percent backwards at \$200,000.00, it would be a
20 million dollars. And that's an offer for sale.

21 It's very similar to the Personal Audio
22 situation. That document alone would be a substantial
23 basis for reasonable royalty calculation.

24 And frankly, you have two fundamental
25 choices as a damages expert. You can try to take this

1 device, for example, and you see it's got a thousand
2 hardware features, none of which are invented, has a
3 thousand software features, one of which was invented,
4 and I can try to isolate the value of that one software
5 feature. That's really hard to do.

6 Before I can look much more directly at
7 what the inventor who said he owned the patent rights
8 was saying his patent's worth, and here when you have
9 that kind of contemporaneous documentation from the
10 inventor offering a chunk of it for sale, for example, a
11 fifth of it for sale for \$200,000.00 saying in response
12 to offers, What I'm looking for is return on my
13 investment and my investment was \$2 million or
14 3 million, those are very good direct benchmarks for
15 reasonable royalty calculation.

16 And that's exactly what the damages
17 expert did in Personal Audio.

18 Quickly, slide 24.

19 This is Georgia-Pacific Factor 11. The
20 extent of use, Dr. Becker did take this into account.

21 In slide 25, he looked at, again,
22 plaintiff's own contemporaneous documentation defining
23 the market itself, and it defined the market as these
24 factors. He very conservatively then took only the
25 factors that Apple participated in to calculate market

1 share, mobile phones, computers, MP3 players.

2 And then in slide 33, he -- he says Apple
3 has 26.8 percent of that market. And so conservatively,
4 let's use that much bigger number because it's certainly
5 at a much lower percentage of the overall market, and he
6 came up with a cap of \$5.7 million.

7 And this graphic is just designed to show
8 that if Apple's use had been half; that is, if his
9 market share had been half, then his cap would have been
10 on the left, \$2.9 million. If Apple's market share had
11 been double, then his cap would have been \$11.5 million.
12 And that certainly is taking into account Apple's use.

13 And again, in his Georgia-Pacific
14 analysis, he talks at some length about other facts he's
15 aware of that factor into the extent to which Apple was
16 and was not using this invention, including the fact
17 that before the hypothetical negotiation, began taking
18 DRM off of its music, and soon thereafter it took it off
19 all together, and so he cited that as a significant
20 factor.

21 I know my -- my time is short. I'm
22 already getting looks from my co-defendants. Let me
23 just finish by pointing out one more case and that's
24 slide 35, which is the SSL Services case, Federal
25 Circuit 2014. Here the district court permitted a

1 damages expert to rely on non-patent agreements in
2 connection with its assessment.

3 These agreements did not license the
4 patents-in-suit. The agreements referenced one of the
5 patents-in-suit saying it was relevant to the technology
6 underlying the agreements, but, as the final bullet
7 says, the agreement gave distribution rates to a
8 software product and that product did not even use the
9 patents' claimed technology.

10 The district court said nonetheless, you
11 know, that's sufficiently tied to these facts that I'm
12 going to go ahead and let a damages expert use that
13 agreement, and the Federal Circuit affirmed.

14 Now, I would submit that these agreements
15 in the SSL Services case are so much further removed
16 from what matters than Mr. Racz's own e-mails about the
17 value of the very patents-in-suit where he's saying,
18 yeah, you can buy a fifth of them for \$200,000.00 or --
19 or you can buy all of my patent rights for an ROI that
20 would give me, you know, a substantial return in
21 connection with my 2- or 3-million-dollar investment.

22 So, what Dr. Becker has done here I think
23 is very defensible. Again, I think far more defensible
24 than it would have been for him to guess at the
25 incremental contribution of one software feature in a

1 phone that had, you know, thousands of features, both
2 hardware and software, is much more direct evidence and
3 it's quite defensible under the law.

4 Thank you, Your Honor.

5 THE COURT: Thank you.

6 Mr. Nemunaitis, you've got final word.

7 MR. NEMUNAITIS: Mr. Batchelder talked
8 about the Personal Audio case and the -- the 2010
9 document involving Mr. Racz. Neither of those were
10 submitted in the briefing -- or I haven't had a chance
11 to consider those, so perhaps we could submit some
12 supplemental brief on that if the Court thinks it's
13 appropriate, but I don't think they change any of the
14 real issues.

15 One of the points he made in talking
16 about the 2005 e-mail and the 2009 e-mail is that they
17 basically say the same kind of thing, and that's exactly
18 the problem. And he can put up different types of
19 documents that Mr. -- Dr. Becker did rely on one and
20 that may have been introduced in the case, but what
21 really matters is has Apple shown that Dr. Becker's
22 analysis is based on reliable methodology and reliable
23 facts.

24 The fact that he relies on to set that
25 maximum amount is the 2005 e-mail. That's what we're

1 talking about. And that's what Apple needs to show is
2 based on a -- a reliable interpretation of what that
3 e-mail is, that it's a cap on the amount of money that
4 Mr. Racz would except for an industry-wide license.

5 I think there's -- there's two ways to
6 think about this that kind of get confused when we're
7 talking about this. Inventor testimony about -- or
8 inventor statements about the value of his patents I
9 think in some cases could be valuable, and it could be
10 valuable in two -- there's two ways to consider why it
11 might be valuable.

12 One is, well, because the inventor would
13 participate in the hypothetical negotiation -- or
14 assuming that the inventor owns the patents, because
15 they would be there in a hypothetical negotiation, if we
16 have a document that says how they're going to act in
17 that negotiation, then we should be able to assume
18 they're going to act the same way in a hypothetical
19 negotiation with Apple.

20 But that's not quite right. That's sort
21 of like assuming that we're playing a hand of poker,
22 Apple uncovered what Mr. Racz's cards are, and they're
23 not going to show their cards and so a damages expert
24 can just look at those cards and use that to figure out
25 what the hypothetical negotiation should turn out to be.

1 Another problem is this. We plan to call
2 Mr. Racz at trial and he may testify regarding what his
3 expectations were, what he thinks the value of his
4 patent is. If he testifies that he would expect to make
5 money from his invention based on the value that his
6 patent provides to Apple's products and based on hard
7 evidence like customer service, about how important that
8 technology is, then that should be sufficient evidence,
9 under Dr. Becker's own methodology, to support a jury
10 verdict if the jury ultimately accepts Mr. Mill's
11 damages number.

12 And so if that's the world we're living
13 in, then I think we just need to know that from Apple,
14 because at that point they shouldn't be allowed to file
15 a JMOL or appeal on damages issue at that point if
16 that's the sort of analysis we're going through to
17 figure out why Mr. Racz's statement are -- are relevant.

18 The other way we can think about this is
19 that a statement from Mr. Racz could be relevant to the
20 hypothetical negotiation if he considered all the facts
21 that would have been around in that negotiation and he
22 basically performed his own damages analysis and he
23 decided, Okay, here's my detailed reasons why I think
24 the value of my patent to Apple is \$20 million. But
25 there's no evidence that that's what he did in this

1 case.

2 The e-mail that we're talking about, and
3 the only evidence that matters for deciding this motion,
4 is that 2005 e-mail that was sent before the iPhone was
5 released, before anyone could have known the extent of
6 infringement, and so there's no way that that could be
7 considered almost a comparable license used in a damages
8 analysis. And so for those reasons, Dr. Becker's
9 testimony should be struck.

10 MR. BATCHELDER: In the interest of time,
11 Your Honor, I will restrain myself.

12 THE COURT: Thank you.

13 All right. What's next?

14 MR. VERHOEVEN: Move on to the --
15 defendant's motion to exclude Dr. Jones. May I
16 approach?

17 THE COURT: Sure.

18 MR. VERHOEVEN: Your Honor, this motion
19 is pretty straightforward and I'll just march right
20 through it. Defendants believe portions of Dr. Jones'
21 opinion should be excluded. Those certain aspects fall
22 into two general categories, Your Honor.

23 The first is Dr. Jones proffering
24 opinions that are just simply not within his scope of
25 expertise, and we list -- we list four of those. And

1 secondly, there's two opinions that Dr. Jones is
2 providing that we consider to be new opinions and were
3 not properly disclosed during litigation.

4 So, the first category, opinions outside
5 of his expertise, we have four categories, Your Honor.
6 He testifies improperly about corporate intent, survey
7 design and methodology, contract interpretation, and he
8 offers an opinion on interrogatory response time that
9 has nothing to do with any computer expertise.

10 To set the stage here, slide 4, Dr. Jones
11 admits that his only expertise is computing.

12 Question:

13 Do you consider yourself to have any
14 particular field of expertise?

15 Answer: Computing.

16 Question: Anything else?

17 Answer: Beyond computing, no.

18 That's from October 3rd transcript, page
19 25, lines 21 through 25. But he goes on to offer
20 opinions in these other four categories, opinions, Your
21 Honor, that are outside the computer scope.

22 So the first category is corporate
23 intent. Now, in Smartflash's opposition, they state
24 that Dr. Jones offers no opinions regarding defendants'
25 corporate intent. But that's just not true.

1 If you look at the report, here you see
2 at page 43 of his August 24 report, Similarly, to the
3 extent that Samsung argues that its customers perform
4 the steps of Smartflash's method claims in the United
5 States, Samsung still infringes Smartflash's method
6 claims by inducing that direct infringement.

7 Goes on at page 43, The is evidence from
8 which the jury can conclude that Samsung subjectively
9 believed in a high probability that it infringed
10 Smartflash patents before filing the lawsuit. He's
11 saying there is evidence of this.

12 And then at page 44 through 45, we've
13 highlighted out, he says, I believe that the jury could
14 find that Samsung willfully blinded itself to its
15 infringement of Smartflash patents. He has no expertise
16 in willfulness.

17 At deposition -- I'm not going to read
18 all these cites in the interest of time, Your Honor, but
19 they're in the slides. But he's asked whether he
20 considered himself to be an expert in marketing -- this
21 is slide 8 -- he said, No.

22 Question: Are you -- you're not an
23 expert in organizational behavior. Is that right?

24 Answer: That's correct.

25 Question: You're not an expert in

1 industrial organization?

2 Answer: That's correct.

3 Question: You're not an expert in
4 economics?

5 Answer: That's correct.

6 Next slide, slide 9.

7 Question: You're not an expert in
8 psychology?

9 Answer: No.

10 Question: You're not an expert in
11 consumer behavior?

12 Answer: No.

13 Question: You're not an expert in
14 assessing individual's motives?

15 Answer: No.

16 So, the law is pretty clear here. It's
17 not appropriate to have a talking head get up, go
18 through all the evidence and say, Well, they must have
19 been willful.

20 And I cite for that the Western District
21 of Pennsylvania case on slide 10, and this is -- you can
22 find this throughout several different cases for the
23 proposition, An expert simply is not in any better
24 position than the jury to assess another's subjective
25 intent.

1 That's not appropriate. We cited in our
2 brief, Your Honor, multiple cases -- this is slide 11 --
3 in which courts have excluded opinion testimony on
4 intent and willfulness. But here, it's not just
5 excluding based on willfulness because it's not
6 appropriate expert testimony. Here the expert admits he
7 doesn't have any expertise in the area of willfulness.

8 So even if you could make the argument
9 that -- that willfulness is properly subject to expert
10 testimony, which we believe is not, but even if you have
11 did entertain that notion, he's not an expert in it.

12 And so, when you look at cases they cite,
13 Spreadsheet Automation Corp., in fact the plaintiff
14 expert offered to testify about patent prosecution, not
15 willful intent, and the court determined before allowing
16 it that that particular expert have all the expertise in
17 patent prosecution and it wouldn't be helpful to the
18 jury.

19 Well, that's a completely different
20 situation, Your Honor, and so on and so forth. So, the
21 corporate intent is another area in which this expert
22 should not be providing testimony to the jury.

23 The next category, survey design, Your
24 Honor, Dr. Jones admits he's not an expert in survey
25 design. We cite the testimony here on slide 15.

1 Are you an expert in survey design?

2 Answer: No.

3 Are you an expert in survey methodology?

4 Answer: No.

5 Yet in his expert report -- and here's an
6 example on slide 16 from page 3 of his September 15th
7 report -- it goes on to offer opinions about the survey
8 design and methodology where he has no opinion on it --
9 or no expertise on it.

10 So he says doctor -- the other side's
11 doctor left it up to survey respondents, did not inform
12 survey respondents of such certain things, did not
13 specify certain things. This is not his area of
14 expertise, how he designed a survey, and he shouldn't be
15 allowed to present opinions on it.

16 Moving on, Your Honor, contract
17 interpretation. He testified he has no expertise in
18 this area as well.

19 Question: So I'm correct that you're not
20 an expert in law?

21 That's correct.

22 And you're not a lawyer. Right?

23 That's correct.

24 And you're not an expert in contract
25 interpretation?

1 That's correct.

2 But yet he goes on to talk about what the
3 contractual obligations of the parties are as part of
4 the basis of his opinion.

5 So, here at page 26 of his August 24th
6 report, he's basing his opinion in part on the
7 interpretation of the contract. Samsung is
8 contractually obligated.

9 And he goes on to do this over and over
10 and over. Defendants are contractually obligated about
11 certain things. Samsung is also contractually
12 obligated. HTC is contractually obligated. Over and
13 over.

14 You know, I'm not going to quote all of
15 these. They're in the slides. But you can see this is
16 not some stray comment. He is using contract
17 interpretation and he shouldn't be doing so unless
18 he's -- unless he's relying on some other expert that
19 has expertise in how to interpret contracts. He
20 doesn't.

21 And then final, fourth category, Your
22 Honor. Time -- he has an opinion for interrogatory
23 response time equals the same thing as the time to
24 formulate non-infringing alternatives.

25 Now, if this was a technical expert

1 saying, This is how long it would take in my opinion to
2 build something, that might be something. But what his
3 basis is, is the amount of time it would take -- he
4 says -- he associates the amount of time it took to file
5 a supplemental response to the amount of time it would
6 take to scientifically develop something.

7 Well, that's not -- that's not reliable
8 evidence or helpful to the jury. It's -- it's a false
9 comparison. Let me move on, Your Honor. Those are the
10 four categories that he does have expertise in.

11 Let's go to the two new opinions. This
12 was confidential but we've worked out. The first is
13 Amazon infringement. Now, you heard -- you heard a
14 whole motion about striking an Apple rebuttal report.

15 Well, take a look at this one. This is a
16 new theory that was first revealed and stuck in a
17 rebuttal report, Your Honor. As you know, privilege
18 cannot be used as a sword and a shield. We disclosed
19 that Amazon was a non-infringing alternative in this
20 case expressly to the plaintiff.

21 And we did it for every single asserted
22 patent. It wasn't just a one-off buried thing. It was
23 repeated over and over and over again.

24 We propounded a Request For Admission
25 No. 17: Admit that the Amazon Appstore for Android on

1 the accused products does not infringe the accused
2 claims of the patents-in-suit.

3 They wrote back and said it's attorney
4 client/privilege, therefore we deny it. We don't even
5 answer. That was the response, Your Honor.

6 We propounded the interrogatory
7 requesting who else do you think infringes, and they
8 never disclosed that they accused Amazon infringes.

9 The very first time, Your Honor --
10 there's a whole bunch of letters back and forth where we
11 try to get answers I don't have time to go into. They
12 refuse to disclose that they considered Amazon to be
13 infringing or non-infringing. They said attorney/client
14 privilege.

15 Then when we got the rebuttal report,
16 Your Honor, we found 3,168-page Amazon claim chart for
17 the very first time. All right. That needs to be
18 stricken. The opinion on Amazon needs to be stricken.

19 Conclusory eleventh-hour disclosures that
20 don't comport with the disclosure requirements must be
21 stricken. Rule 37(c)(1) says the same thing, Your
22 Honor. So, we believe that that opinion should be
23 stricken.

24 And very briefly, Your Honor, the second
25 opinion we believe is new and should be stricken is a

1 new analysis of Claim 11 of the '458 patent.

2 And I'll just show you two slides here,
3 Your Honor. I'm skipping to slide 42 in the interest of
4 time. There are several slides that -- we submit
5 there's more. But the original infringement contention
6 with respect to Claim 17 for Play Movies were rental,
7 time period for rental. That's what they said may
8 permit partial use of the data term. All right.

9 The new theory that we got for the first
10 time is not timely. It's a completely different
11 functionality for the very first time, and that is to
12 the user's pause state, not a rental.

13 That's not -- it's not a subset. That's
14 a completely different functionality. And -- it's --
15 and we'll go through that.

16 Same thing is with Books. For Books they
17 said a rental period met this claim, and now their brand
18 new theory is you go into airplane mode and pause it.

19 Okay. Your Honor, those are new theories
20 and they should be stricken. With that, Your Honor,
21 I'll sit down.

22 THE COURT: Response.

23 MR. CURRY: Good afternoon, Your Honor.
24 Austin Curry for plaintiffs. May it please the Court.

25 I'll try to go a little slower to unpack

1 some of these issues. The first is corporate intent,
2 and what they focus on a lot is the low hanging fruit of
3 case after case after case that said experts can't opine
4 to intent.

5 We've already said we're not going to do
6 it. They go back to his report. He did make an opinion
7 in his report, but we're saying he's not going to do it.

8 And so the low hanging fruit cases of
9 experts can't talk about matters of intent are just not
10 applicable to this situation. The only cases that are
11 applicable are the Spreadsheet Automation and the Tivo
12 v. Echostar cases.

13 And the defendants tried to distinguish
14 those cases as hinging on that the experts were
15 qualified as patent prosecution experts, but in reality
16 what those cases hinged on is Judge Fulsom's
17 understanding that having a technical expert not testify
18 about intent but instead present evidence from which the
19 jury can make that conclusion, that presentation would
20 be helpful to the jury. And it makes sense.

21 You know, we -- we go through these cases
22 and we trudge through with the checks with all the
23 claims and at the end of it, if there's not something to
24 tie the technical side of the infringement case to how
25 the jury can evaluate facts for the liability, 271 (a),

1 (b), (c), the acts of infringement with respect to what
2 they do with their products that meet the claims,
3 it's -- it's going to leave the jury in a lurch. And
4 that's why we want to do it. I -- I really think it
5 will be helpful to a jury.

6 And they say, Well, Dr. Jones admitted
7 that he's not a patent prosecution expert. Okay. Well,
8 the evidence that -- part of the evidence that would be
9 submitted, at least, would be when was a patent of
10 Smartflash's cited against a Samsung patent.

11 You don't need to know the ends and outs
12 of the MPEP to figure out the date on which that
13 happened. If you have a -- a passing understanding of
14 how prosecution histories are laid out and how they're
15 sequenced in a file, you can figure out that date.

16 And so while it's not something that, you
17 know, a lay person would have someone with -- with no
18 experience interviewing patent prosecution histories,
19 Dr. Jones certainly has that. I mean, they have a slide
20 that says, well, you know, and -- in the Tivo case,
21 the -- the party offering the witness met its burden and
22 they didn't. Why, because you said so?

23 I mean, Dr. Jones has spent lots of time
24 looking up prosecution histories, and -- and if they
25 actually had a factual dispute of, Oh, no, Smartflash's

1 patent wasn't cited against the Samsung patent that
2 day -- I mean, in other words, if he was wrong on that
3 issue, they would have certainly brought it up.

4 So, the issue really is will the
5 presentation that we want to take the jury through with
6 the help of Dr. Jones be helpful to the jury. And it
7 will.

8 With respect to survey design, I don't
9 know -- Mr. Verhoeven didn't argue this, but originally,
10 what they tried to do is they tried to say, well,
11 Dr. Jones isn't an expert on survey design, therefore
12 strike his criticisms of Reibstein, and by the way,
13 strike his non-infringing alternative opinions as well.

14 Well, we called them on it in their
15 response, and they -- they tried to support it in the --
16 their reply, and, you know, we went through the
17 sur-reply. Mr. Verhoeven didn't argue it.

18 I don't know if they're still saying that
19 Dr. Jones shouldn't be able to give opinions as to what
20 a non-infringing alternative is.

21 But in any event, the only thing that was
22 argued today was that they say that Dr. Jones'
23 criticisms of their expert, Dr. Reibstein, should be
24 struck because he's not a survey design expert.

25 But here's what the issue is, so what

1 happened is Dr. Reibstein has a report and in the very
2 beginning of his report, he says Amazon isn't accused of
3 infringement, therefore it must be non-infringing.

4 Reibstein offers no technical analysis.
5 Zero. If there were some, I'd show it to you and say,
6 Well, this is deficient for the following reasons, but
7 there's nothing to show you.

8 And so Reibstein goes out and he creates
9 screenshots that look like this, which is on your
10 screen, to make the Amazon Appstore for Android and the
11 Google Play Store look as identical as possible.

12 Now, Reibstein, in doing this analysis,
13 never stopped, not -- not once, to consider any actual
14 technical differences between the Amazon Appstore and
15 the Google Play Store. And it's a -- it's a defect that
16 he carried into his survey.

17 And his conclusion of the survey is, it's
18 acceptable to this extent; in other words, it's a
19 non-infringing alternative that is acceptable to a
20 certain extent.

21 There's just this huge gap in Reibstein's
22 report, and he uses the -- the results of the survey to
23 support his opinion that they are -- in the degree to
24 which the two are acceptable.

25 But what Dr. Jones says to criticize

1 Reibstein is, Not so fast. You didn't stop at all to
2 consider the actual technical differences. And if your
3 survey doesn't test acceptability of an alternative,
4 number one, it's not non-infringing; but number two, you
5 didn't evidently appreciate the technical differences,
6 so you yourself were not equipped to tell your survey
7 respondents of the technical differences.

8 So any -- the point is the fact that
9 Reibstein carried through this mistake into a survey
10 can't shield him from that criticism. And it's not --
11 it's not something that we're offering Dr. Jones as a
12 survey expert on. We're offering him as an expert in
13 his technical capacity to show the extent to which in
14 the gaps of Reibstein's opinion.

15 Contract interpretation is a very similar
16 issue. What happened there is they have another expert,
17 Dr. Goldberg, and what Goldberg says is he comes up --
18 he looks at the scope of the claims and based on the
19 different nuances of the claims, he says, Change that.
20 That's a non-infringing alternative.

21 And his conclusion is, And it's an
22 alternative that is technically feasible, and then he
23 makes this huge jump from technical feasibility to
24 availability.

25 And similar to Reibstein having a gap in

1 his analysis, not once did Goldberg ever stop to
2 consider that technical feasibility and availability
3 aren't the same thing.

4 And so what Dr. Jones says is, You don't
5 have the right. And if you do, you haven't explained
6 it, Goldberg, of how Samsung and HTC have some unknown
7 right to go implement any technically feasible
8 alternative if it means, you know, avoiding paying for a
9 patent license.

10 And so what they're -- what they're
11 saying is, Well, no. Stop. Jones can't say that
12 because that's contract interpretation. Well, it's --
13 what it is, it's an opinion as to the availability of a
14 technical allegedly non-infringing alternative.

15 It's not that this is hinging between the
16 experts on some disputed contractual term. That's not
17 what's at issue. There are contracts that Dr. Jones
18 cites. And on the plain face of them, you don't need to
19 be a contract expert to read them and understand them.

20 On the face of them, they say -- they lay
21 out the rights between Samsung and HTC and Google on the
22 other hand. And so, again, it's a criticism of Jones'
23 against Goldberg. And that's what they're really trying
24 to protect against.

25 They know that there's a huge gap in

1 Goldberg's analysis where he conflates technical
2 feasibility with availability. They don't want that
3 criticism raised. And this Daubert is their method of
4 doing it. They're trying to squelch the criticism of
5 this huge gap in Goldberg's analysis.

6 Similarly, what Goldberg does with
7 respect to the time to calculate the non-infringing
8 alternatives is Goldberg, for each of his alternatives,
9 he has the same boilerplate language in his expert
10 report, and it's basically, I've been an expert for X
11 number of years. Based on my expertise and in
12 conversations with different engineers, it would take
13 three months for this alternative, eight for this one,
14 twelve for that one.

15 It's totally opaque. It's -- it's
16 impossible for us to actually test. It's pure
17 speculation. It can't be tested. No discernible
18 methodology in these time estimates that Goldberg said.

19 So what Jones does is say, Well, I just
20 know you're wrong. How do I know you're wrong? Because
21 one of two things: Either you credited Samsung and HTC
22 for having the ability to immediately come up with a
23 non-infringing alternative, and that'd be wrong; or, you
24 didn't include that time in your analysis.

25 In other words, you started at that point

1 where they have it, they have the non-infringing
2 alternative contention, and just how long now does it
3 take to implement it.

4 Well, we know how long it took these
5 defendants to come up with their non-infringing
6 alternatives. And what's funny is in -- in our
7 response, I pointed out that they were very careful in
8 their motion -- in their Daubert motion against Jones to
9 say that in reality, in a non-litigation context, they
10 could have come up with these alternatives any quicker
11 than they did in this litigation because then 37 -- Rule
12 37 would trigger, and they should be excluded on that
13 basis.

14 So, if we assume that they timely
15 supplemented their interrogatories and they timely
16 submitted these non-infringing alternative contentions,
17 we know empirically, just empirically, how long it took
18 Samsung and HTC to come up with their non-infringing
19 alternatives.

20 And so what they say is, Well, that's not
21 something that can be used to estimate the time to come
22 up with an alternative and so Dr. Jones' testimony
23 should be stricken as not reliable. It's not something
24 that scientists use.

25 But that's not what we're doing and

1 that's not what Dr. Jones is doing. He's criticizing
2 Goldberg by something that we know to be empirically
3 true.

4 There's no Daubert issue here. There's
5 no methodology issue here. There's a fact issue that's
6 bad for them, good for us, and they're trying to act
7 like it's a Daubert issue to, again, keep criticism
8 from -- their experts from coming into this trial.

9 And then just keeping in course with the
10 ways and -- or the sequence in which Mr. Verhoeven
11 argued; so, they say that there is a new infringement
12 theory for one claim of one of the asserted patents, and
13 specifically Claim 11 of the '458 patent.

14 May I have the document camera?

15 Now, what this claim relates to is
16 partial use of a data item for one part, and that's the
17 part that we point to. We always have and we still do
18 point to that as movie rentals.

19 But here's where they are going wrong.
20 The second part -- I hope I didn't destroy the words
21 with my sloppy underlining, but the second part is, and
22 further comprising code to write partial use status data
23 to the data carrier when only part of a stored data item
24 has been accessed.

25 So, in our infringement contentions, we

1 didn't corral all the evidence that the second part of
2 Claim 11 has met because there's no requirement to
3 corral all evidence. We laid out our case that this
4 claim relates to movie rentals and here's how.

5 In the infringement report, clearly we
6 meet every claim and every limitation through
7 explanation and evidence. And that's what's going on
8 here. The claim requires that you write the partial use
9 status data to the data carrier.

10 The role of the Airplane Mode and
11 powering the device on and off is to provide evidence
12 that that is actually happening. In other words, we
13 know it's -- it's written to the data carrier because I
14 powered the device off so it's not just stored, you
15 know, somewhere in volatile memory. And when I powered
16 it back on, it's still there.

17 Now, what Airplane Mode tells me is, I'm
18 not going and fetching it off the Internet. So, these
19 claims and the -- the theory still relate to movie
20 rentals. The Airplane Mode was evidence of
21 infringement.

22 And now -- slides, please.

23 So, finally, there's the sword shield
24 argument, and it's much different from the -- Apple
25 telling us they don't have alternatives and then later

1 coming back with their expert and low and behold they
2 did.

3 If we're going to deconstruct what
4 happened with this Amazon issue -- and I know
5 Mr. Cassady will get into it more later with respect to
6 Smartflash's motion, but this is a case against Samsung
7 and HTC for use of Google Play.

8 And in discovery, the defendants had
9 tried to get into attorney/client communications and
10 work product about what else infringes, and we -- we did
11 shield that. But, very importantly, those
12 communications were properly protected.

13 This isn't a scenario where in response
14 to their conclusory allegation that Amazon isn't accused
15 therefore it infringes, we had Mr. Racz say, Well,
16 Amazon infringes because my attorneys told me so, and
17 then shut down, you know, further attempts on
18 questioning on that based on the attorney/client
19 communication.

20 There was no selective favorable waiver
21 of attorney/client communications or work product. And
22 so that's why in our reply we cited the case that stands
23 for the proposition that when you disclose things in
24 litigation, that doesn't make things that come before it
25 automatically waived and it doesn't destroy the waiver

1 for those things.

2 Easy example. They sent us an
3 interrogatory. We serve our response in 30 days. That
4 doesn't mean that our disclosure of our interrogatory
5 response destroys the attorney/client communication and
6 the work product that led up to that disclosure.

7 And here, that's what happened. There's
8 stuff that -- in attorney/client communications and work
9 product that is properly protected and is still properly
10 protected, and they don't dispute that point. They
11 admit that there's been no waiver. They said that in
12 their reply.

13 They said, Y'all, we're totally missing
14 the boat. There's been no waiver. But that's our point
15 exactly.

16 This is a Fifth Circuit case, Willy v.
17 Administrative Review Board, 2005, and the case says
18 that the sword and shield analogy, is a product of our
19 paralleled reasoning behind the doctrine of implied
20 waiver: A party may not use privileged information both
21 offensively and defensively at the same time. In other
22 words, when a party entitled to claim the
23 attorney/client privilege uses confidential information
24 against his adversary (the sword), he implicitly waives
25 its use or -- protectively (the shield) under that

1 privilege.

2 Their admission that there's been no
3 waiver; in other words, we properly protected
4 attorney/client communications and work product, and
5 later made a timely disclosures, means that there's no
6 sword/shield violation here.

7 So, in other words -- in sum, Your Honor,
8 this -- this attack on Jones is -- you know, allegedly,
9 untimely disclosures and areas where they say, Oh, he's
10 going so far outside of his field of expertise, they're
11 just trying to throw as much on the board to see what
12 sticks as possible to avoid criticism of their experts,
13 to avoid evidence of infringement, to make it to where
14 they can be the only ones that say, Oh, Amazon infringes
15 because it wasn't accused, and have nothing said in
16 response. It's just improper. Every single one of
17 their attacks on Jones is completely without merit.

18 Thank you.

19 MR. VERHOEVEN: If I may Your Honor.

20 THE COURT: Uh-huh.

21 MR. VERHOEVEN: I'll be really brief, but
22 I have five brief rebuttal points to make. First, on
23 willfulness, the statement was made that this will be
24 helpful for the jury. What they want to do is have an
25 expert get on the stand and interpret a bunch of

1 evidence and say to the jury that this is willful.

2 It's like saying my closing argument is
3 helpful for the jury. It's not evidence. It's somebody
4 interpreting evidence. And it's fine if the jury needs
5 some assistance in understanding technical concepts.

6 But did somebody act with subjective bad
7 faith, did somebody intend something to happen, those
8 are not subjects that you hire expert witnesses to put
9 on the stand for. And even if they were, Your Honor,
10 their expert doesn't have the background expertise to
11 even qualify. That's point number one.

12 Point number two, Your Honor, on the
13 survey. What you heard on the survey was that our
14 survey expert, Dr. Reibstein, had problems with his
15 survey. And attacks on that. Well, that's fine. They
16 can cross-examination him.

17 They have their own survey expert who has
18 survey expertise and does actually criticize Reibstein
19 for the same sort of stuff. He's got expertise, but
20 Mr. -- Dr. Jones is a computer scientist. He doesn't
21 have expertise.

22 So, the fact that their critique of
23 Reibstein, even if there's merit to it, if there's some
24 way to critique it, the answer doesn't mean that their
25 unqualified expert should be able to do that attack.

1 They have to find the right mechanism to
2 do that attempt, which is cross-examine or their own
3 qualified survey expert. Jones is admittedly not a
4 qualified survey expert.

5 Point number three, Your Honor, on the
6 contract claim. I wrote this down when he said it. He
7 said, You don't need to be a contract expert to read and
8 understand these terms.

9 Well, then why do you need an expert?
10 You only have an expert to interpret things if it's
11 necessary to be helpful for the jury. If we need an
12 expert to talk about it, then that expert has to have
13 qualifications in the area. Mr. Jones doesn't have
14 qualifications in the area. Either the contracts don't
15 need expert interpretation, the expert shouldn't be
16 interpreting them; or, if they do, then we need a
17 qualified expert, not a computer science person.

18 Fourth point, Claim 11.

19 Put up slide 44.

20 You heard counsel admit as to this
21 element of Claim 11 up there on the right, to write
22 partial use status data to the data carrier when only
23 part of the stored data item has been accessed.

24 He stated, Well, we didn't have anything
25 in our infringement contentions on that element. He

1 just said that. And now they're putting a new theory
2 here.

3 Now, what we cite is what they did have
4 in their contentions, Your Honor, corresponding to that
5 element, and it was time period for rental. Now they've
6 got a completely different accused methodology.

7 Go to the next slide, please.

8 Their new infringement theory is
9 completely different for that element, is stored in
10 non-volatile memory that can be accessed after the
11 device is powered down and restarted while in airplane
12 mode.

13 Okay. That, immediately from counsel,
14 was not in their contentions. This is a new theory. It
15 should be stricken.

16 Fourth [sic] point, Your Honor, on
17 Amazon. Counsel missed completely and fundamentally
18 misunderstands the sword and shield doctrine, Your
19 Honor. This isn't about whether you've waived
20 something. It's about misusing your privilege for your
21 own advantage.

22 So, the misuse of the sword and shield
23 is, for example, if you -- in this case, you hide your
24 contentions under the privilege doctrine until the
25 rebuttal report when they can't be -- all the responses

1 are done. It's the last report and you spring a brand
2 new theory.

3 That is to our disadvantage, their
4 advantage. They use the attorney/client privilege as a
5 shield, and then it was to their advantage they remove
6 the shield in that same subject matter and use it as a
7 sword.

8 Now, they cite the Willy case, and I saw
9 it on that slide. The sword and shield doctrine applies
10 both ways, Your Honor. And they cite this Willy case.
11 That's when they're using it as a sword first. Right?
12 And if you use it as a sword, then you've implied you've
13 waived the rest of it.

14 There's a famous Supreme Court case I'm
15 blanking on the name of where they had a single document
16 and the prosecutor used a part of it and didn't want to
17 produce the other part, and he had to produce the whole
18 thing under the sword and shield doctrine. Well, that's
19 the offensive use, the sword. It applies the other way,
20 too.

21 If you use it as a shield, then you can't
22 later use it as a sword. You've made your -- you've
23 made your bed; you have to live with it.

24 So, this isn't about waiver by producing
25 something. This is about not being able to raise an

1 argument because they asserted the -- privilege as a
2 shield.

3 Thank you, Your Honor. That's all I
4 have.

5 MR. CURRY: Just a couple of points,
6 because I don't think we're making much traction in
7 addition to what's already been briefed.

8 With respect to the notion that Dr. Jones
9 must be a contract expert to offer a criticism that a
10 non-infringing alternative is or is not available,
11 consider what their expert did, Dr. Goldberg. He jumped
12 from technical feasibility all the way to a conclusion
13 of availability.

14 So, if anyone is making any sort of
15 contractual opinions, it's Dr. Goldberg who says tacitly
16 and without any explanation or any evidence that any
17 technically feasible alternative is available to Samsung
18 and HTC if it is technically feasible despite any
19 contracts. In other words, Dr. Goldberg just
20 short-circuits it. That's his opinion.

21 Finally, with respect to the sword
22 shield, Smartflash made a timely disclosure. We
23 actually answered the interrogatory saying things like
24 Amazon might infringe; we just didn't know. We denied
25 their RFA. We didn't stand on our privilege and refuse

1 to answer. We actually provided a denial when they
2 said, Admit that it does not infringe. We denied.

3 We didn't deny because of the
4 attorney/client communication or work product doctrine.
5 What we did is we denied because we didn't have any
6 information. We haven't even finished any sort of
7 analysis at that point.

8 When it came time to responding to their
9 unsubstantiated exactly zero analysis of saying it's not
10 accused, therefore it infringes -- or it doesn't
11 infringe, we were then able to make a timely disclosure
12 on it.

13 And what you didn't hear was any sort of
14 argument that there's been any waiver of what was
15 previous -- previously shielded. Our attorney/client
16 communications about Amazon are still protected.
17 They're still in tact despite the Jones' rebuttal report
18 on Amazon. There's no argument to the contrary. None.

19 And the purpose of citing the Fifth
20 Circuit case in 2005 is that it -- it explains that the
21 Sword Shield Doctrine in applied waiver rise and fall
22 together. They don't say waiver. That in itself -- in
23 fact they admit that there's been no waiver. That shows
24 that there's no misuse of the sword shield, no misuse of
25 attorney/client communication.

1 And -- and contrary to what Mr. Verhoeven
2 reads that case to read -- to say, it doesn't say that
3 the sequence matters. It's well established that, you
4 know, again, when we make a disclosure in litigation,
5 that doesn't destroy privilege and protected information
6 that came before it.

7 If that were the case, well, I would
8 expect all of their work product and attorney/client
9 communication around the issue of invalidity. They
10 haven't given it to us, yet they've given us their
11 invalidity contentions and reports. They've made that
12 disclosure to us.

13 Again, it's -- it's recognition that --
14 it's not the sequence. It's that there's no waiver.
15 There's no sword shield of misuse.

16 Thank you.

17 THE COURT: All right.

18 MR. VERHOEVEN: Nothing further, Your
19 Honor.

20 THE COURT: Okay. What's next?

21 MR. VERHOEVEN: The next motion is
22 defendant's motion to -- to exclude expert testimony
23 related to surveys. This is the Wecker base one.

24 May I approach, Your Honor?

25 THE COURT: Yes.

1 MR. VERHOEVEN: Okay. Your Honor, this
2 first slide summarizes basically what the motion is.
3 Dr. Wecker is a survey expert that was retained by
4 plaintiff. Dr. Wecker conducted four surveys on
5 consumer motivation to purchase their tablet or
6 smartphone.

7 Smartflash uses the responses to those
8 questions -- motivation to purchase questions -- to
9 attempt to satisfy the LaserDynamics damages standard,
10 Your Honor. Neither of the survey questions nor the
11 responses are consistent with the LaserDynamics test,
12 the sole motivation test. They've got the wrong
13 question.

14 Smartflash can't meet its burden of
15 showing the survey was prepared in accordance with
16 reliable principles and methods, Your Honor, because the
17 test -- the question they asked on motivation is not
18 consistent with the test of LaserDynamics.

19 So, really quickly, Dr. Wecker prepared
20 four surveys related to the smartphone and tablet
21 purchasing decisions; an App Store survey, Movies and
22 TV shows survey, Music survey, Books and Parental
23 Controls survey.

24 The surveys asked respondents whether
25 certain features motivated them to buy their device.

1 These are examples from the Wecker survey.

2 Question 5: Did the capability to rent
3 and download motivate you to buy the device?

4 Question 4: Did the capabilities to
5 purchase apps motivate you to buy the device?

6 Question 11: Did the capability to make
7 in-app purchases -- same phrase -- motivate you to buy
8 the device?

9 Question 4b: Did the capability to
10 purchase and download books motivate you to buy the
11 device?

12 And that question -- that framework is
13 used consistently throughout the survey with the
14 motivate questions.

15 Now, it's undisputed -- it can't be
16 disputed, really, that Mr. Mills, the damages expert,
17 takes those motivation question results and plugs them
18 in to his damages analysis for the purpose of meeting
19 the LaserDynamics test.

20 Here we have deposition testimony at 71.

21 Question: Now, Mr. Mills, in connection
22 with your work in this case, you have relied on certain
23 surveys that were done by Mr. Wecker; is that correct?

24 Answer: I've relied on Dr. Wecker's
25 surveys, yes.

1 Next slide. At page 121 of Mills
2 deposition;

3 Question: Okay. But did you use that in
4 the royalty base calculation?

5 Answer: No, I used the question
6 regarding motivation to purchase.

7 That's the Wecker motivation to purchase
8 questions.

9 And then at 122;

10 Question: Why did you do it that way?

11 And this is their damages expert.

12 Well, in part because my understanding
13 of -- well, the -- the phrase motivation to purchase or
14 motivation to buy is something that's found in
15 LaserDynamics, and so based on my understanding of the
16 current state of the law, I thought that that would be
17 an appropriate question to use to apportion the base.

18 Right there he says he used the
19 motivation questions to satisfy the test in
20 LaserDynamics.

21 Question: So that's based on your
22 interpretation of LaserDynamics; fair enough?

23 Yes. In part, yes. I also think it's a
24 reasonable approach, but the language itself appears in
25 that case.

1 Well, Your Honor, as you know, when you
2 read the holding of LaserDynamics, there's a very
3 important word that exists in the holding that was left
4 out of the survey. LaserDynamics -- this is at page
5 69 -- 694 F.3d 51.

6 On the record before us, the patented
7 method is best understood as a useful commodity-type
8 feature that consumers expect will be present in all
9 laptop computers. There is no evidence that this
10 feature alone motivates consumers to purchase a laptop
11 computer, such that the value of the entire computer can
12 be attributable to the patented disc discrimination
13 method.

14 It's very clear. We're not talking about
15 just the motivation. It has to be -- the feature alone
16 motivates to buy. That's the law. That's
17 LaserDynamics. There's no question about it.

18 You read further, on page 68, But proof
19 the consumers would not want a laptop computer without
20 such features is not tantamount to proof that any one of
21 those features alone drives the market for laptop
22 computers.

23 LaserDynamics says just because you show
24 people like it, not enough. You have to show that the
25 feature alone drives the market for laptop computers.

1 Proof that consumers would choose the
2 laptop computer having the disc discrimination
3 functionally -- functionality -- which was the
4 functionality at issue in that case -- says nothing as
5 to whether the presence of that function is what
6 motivates consumers to buy a laptop computer in the
7 first place.

8 So, they've got the wrong test, Your
9 Honor. And -- and you don't have to just take my word
10 for it. You can see the results of the test demonstrate
11 beyond refute that the survey respondents interpreted
12 the motivation question to not be motivate alone.

13 So if we could go to slide 16.

14 So this a -- this data is not disputed,
15 Your Honor. This is a amalgam of data from the
16 respondents. And you can see here -- oops -- this
17 doesn't work on the screen.

18 If you look on the screen and take a row,
19 number of Respondents Overlap percentage, you see
20 iPhone, for example, they're asked whether a certain
21 scenario -- any -- the survey asks the respondent
22 whether a particular accused feature motivated their
23 purchase. And then they ask for another -- another
24 feature, a different feature, and whether that motivated
25 their purchase.

1 And as you can see here -- I'll just use
2 the iPhone -- 23 of the respondents out of, I guess, 56
3 respondents said Both, different features, motivated
4 them to buy.

5 Well, that necessarily means that it
6 didn't solely motivate them to buy, Your Honor. And if
7 we let this survey in, we're going to have a skunk in
8 the jury box because this is -- this is going to --
9 they're going to say this is sole motivation.

10 In fact, if you go back a couple of
11 slides, that's what Mr. Mills says he's assuming when he
12 plugs the survey results into his report. And we know
13 from the survey results themselves that can't be the
14 case. It simply can't be the case.

15 They've taken a -- they've applied the
16 wrong test, and that's not fixable. That doesn't go to
17 weight, Your Honor.

18 Another tell here is if you add up the
19 sum of the motivation responses, it's 135 percent. If
20 it was sole motivation question, it would be way below
21 100 percent, Your Honor. It mathematically doesn't make
22 any sense what -- what these are -- these survey results
23 are showing.

24 And when you look at all the other
25 features that might be motivations, battery life,

1 processor speed, memory size, camera quality, ability to
2 send and receive text messages, screen quality, all
3 these are major, major features on phones that are
4 completely not analyzed. And if you put the sole in
5 front of motivation, those features will probably be
6 more important to consumers I would suggest, Your Honor.

7 Plain meaning of motivate does not mean
8 sole motivation. You can be motivated by all kinds of
9 things. That's not the LaserDynamics test.

10 Okay. Smartflash can't take that test
11 and prove to you that they used reliable methodology,
12 Your Honor. Nothing was done in those tests to ensure
13 the respondents understood that the motivation questions
14 were asking for their sole motivation.

15 Three of the four of surveys weren't even
16 pretested, Your Honor. None of the motivation
17 questions, zero, were pretested, Your Honor. The survey
18 responses will -- fail Dr. Wecker's own standard for
19 reliability, which is the number of "I don't knows."

20 And finally, the motivation questions in
21 issue were drafted by the lawyers in this case, lawyers
22 who know LaserDynamics, Your Honor. This is not a
23 mistake. It was a choice. And the choice is a broken
24 test.

25 Given the amount of time I have left, if

1 I could just have one second to organize my thoughts.

2 (Pause in proceedings.)

3 MR. VERHOEVEN: I think I'll reserve my
4 remaining time for rebuttal.

5 THE COURT: Okay. Response.

6 MR. CASSADY: May it please the Court.
7 Jason Cassaday the plaintiff.

8 Your Honor, I'm going to go in reverse
9 order here and -- and I'm going to do that because,
10 apparently, no matter how we say it in the briefing,
11 separating the issue of LaserDynamics from the survey
12 versus LaserDynamics for the damages expert doesn't seem
13 to work. So maybe this is reverse order so we can deal
14 with the Wecker issues. And I'm going to talk about
15 LaserDynamics, but I can't do that without talking about
16 both Mills and Wecker.

17 So, first off, in this case like in every
18 case against a defendant, we asked the defendants, Hey
19 how do you guys evaluate? How do you guys do it? How
20 do you figure out whether a feature is important or
21 valuable or you want to put it in there? We asked that
22 question, and that's the one here.

23 If Apple does not know, why don't you
24 tell us how you might figure it out. And of course the
25 answer we get back is, We don't know how to do it. We

1 don't do it during the ordinary course, which we -- we
2 know they do run surveys but they don't put that in
3 there. And they talk about all these issues and say, We
4 couldn't do it.

5 Then we say -- what we heard today --
6 what about the non-infringing alternatives. And we say,
7 What about non-infringing alternatives? What do you
8 got? Apple gives us nothing. Samsung, HTC wait till
9 five minutes before the end of discovery to give us
10 theirs. That's where we were.

11 And so, you know, during Mr. Caldwell's
12 argument today about the prejudice that we had under
13 Dr. Wechselberger, having his opinion about
14 non-infringing alternatives, here's the prejudice. We
15 didn't just stop there and stood on our hands. We went
16 and spent hundreds of thousands of dollars, hundreds of
17 thousands of dollars just on the surveys.

18 That's not attorney time. That's not
19 other experts' time. That's not other people involved.
20 It was hundreds of thousands of dollars invested in
21 trying to figure out the answer to this question by
22 running a survey. And so we did it.

23 So, let's get Dr. Wecker first.
24 Questions of Survey Methodology Go To the Weight of the
25 Evidence. End of story. It's crystal clear in hundreds

1 of cases that if you don't like a little nitpicky thing
2 about the survey, tell the jury about it. It goes to
3 weight. It's not a methodology issue.

4 And so here, Stated differently,
5 methodological errors generally speak to weight, not
6 admissibility. Finally, we note that defendants are
7 permitted to attempt to discredit Dr. Wecker and his
8 survey through aggressive cross-examination.

9 And that's what you just heard all those
10 arguments about. We're just -- it's all
11 cross-examination fodder. They can -- they have a good
12 time with that at trial, and they can try and get the
13 jury to be the finder of fact on that issue.

14 So, we go forward, and what you also
15 heard subtly underneath there -- they get into it in a
16 lot of detail. The motion says it quite a bit -- was
17 that Dr. Wecker wasn't qualified. You've already heard
18 Dr. Jones wasn't qualified, and Mr. Mills I'm sure soon
19 will get told he's not qualified.

20 But the reality of the situation is those
21 three experts together, two Ph.D's, a master's degree, I
22 believe an MBA, a number of other degrees on top of also
23 working with the counsel in this case, which I think
24 very highly of -- so, on top of all that, those parties,
25 they put the survey together. Those experts spent all

1 that time. They did all this work.

2 Dr. Wecker in his testimony said, I've
3 been doing surveys since the '70s. I've been working on
4 surveys. I've been doing these things. I've been
5 working on the methodology, and just like that. He's
6 testified in cases like this. He's worked for
7 third-party people. So he's qualified. There's no
8 question of that. And the methodology he followed in
9 this case follows that.

10 And so with regards to pretesting,
11 Dr. Wecker unequivocally testified, I ran a pretest. He
12 says -- we asked, Are there any other surveys that were
13 performed in connection with this case that you're aware
14 of?

15 He says, No, they're not, although in
16 addition to the four surveys described there was a
17 pretest, but that information was provided in my
18 disclosures.

19 And what counsel for the defense is
20 trying to say is, because you didn't pretest each and
21 every survey, that that means there's no pretesting done
22 for the surveys.

23 But, your Honor, if you look through the
24 surveys, the formatting is very similar for all the
25 surveys. The question-asking is very similar for all

1 the surveys. The pretesting was a single survey, the
2 exact one we relied on which is the App Store survey.
3 That is the pretest that is for the all the surveys.

4 And Dr. Wecker testified that he made
5 that pretest. He did that, he made some adjustments
6 based on it, and he went forward with the -- with the
7 surveys.

8 As I said, Your Honor, the majority of
9 damages in this case are based on the single survey that
10 the pretest was specifically for, the one that was rated
11 an app -- in-app purchases. So again, these
12 methodological issues go there.

13 So, then, you also heard Mr. Verhoeven
14 say that with regards to the pretesting, he didn't
15 follow his own standard. Now, Dr. Wecker said that he
16 likes to do a pretest and see if he notes any confusion
17 in the questions, but he conservatively uses "I don't
18 know" against the -- basically the negative side of
19 what he's doing.

20 So, for instance, in the Motivated To Buy
21 question, if he asks you yes or no, and I don't know, I
22 don't know counts as a no answer. Which means to the
23 extent there's confusion, he puts the confusion against
24 Smartflash. That's what he does. And he's done that in
25 other cases.

1 Now, their own survey expert in this
2 case, when he ran a survey for Samsung -- so Dr. Wecker
3 says, I -- I instructed you not to guess. Those are
4 SATs, Your Honor. Do not guess. He said, Do not guess.
5 Don't do it. That's what Dr. Wecker says to them.

6 Dr. Reibstein won't even include an "I
7 don't know" in his questions in his survey. His survey
8 is all of a sudden, you know, reliable. He -- he just
9 assumes they understand the question, gives them no
10 option for I don't know.

11 And you know why he does that, Your
12 Honor, because he doesn't like what happens when he does
13 "I don't knows." When he puts "I don't knows" in, he
14 gets people to answer I don't know against the question
15 he's trying to get answered. And so he doesn't like it.

16 He says, You end up having a
17 disproportionate number of people that actually select
18 the "Do not -- Do not know." So I actually believe that
19 what is going -- going to do is distort the data from
20 people that actually do have an opinion and yet don't
21 know with certainty.

22 Your Honor, in all of our tests, I don't
23 think more than 25 percent or 26 percent of people said
24 "I don't know" to our questions. So, people understood
25 the question. And Dr. Wecker understood that they did

1 that, and Dr. Reibstein -- Reibstein just decided to
2 dodge that issue.

3 And so the point in going through all
4 this is to just say to Your Honor, all the
5 methodological issues that were towards the end of
6 Mr. Verhoeven's analysis are all weight issues. They're
7 all cross-issues.

8 And in fact, Your Honor, they're all
9 "death by a thousand paper cut" complaints. They're
10 little -- little thing here, little thing there. And
11 that's what that -- put that in front of the jury.

12 Explain to the jury that there's a bunch
13 of little things that we think he could have done a
14 little bit better in his survey, and you can blow it up
15 and make it is as big as you'd like to but that is not a
16 methodological flaw that causes us a Daubert. It goes
17 to weight, and -- and it goes in front of that jury.

18 And with regards to the survey here,
19 place LaserDynamics' attacks on Dr. Wecker. Dr. Wecker
20 is out taking his survey and he's asking the questions.
21 His survey is sound methodologically.

22 Now, the real question is, the defendants
23 don't believe that he got Mr. Mills over the hurdle of
24 whether or not he can rely on that for damages. That's
25 entirely irrelevant to this survey. This survey is

1 methodologically sound. It comes in. That's the way it
2 should work, and they can cross it. And that's how
3 Wecker's works.

4 Now, with regards to LaserDynamics and
5 with regards to Mr. Mills, you know, the issue there
6 is -- what happened is they're trying to couch the
7 scenario that we're in in this case as an entire market
8 value rule argument. They're saying that we're taking
9 all the total revenues and we're -- we're multiplying it
10 by royalty rate in clear fashion against the non -- or
11 against the LaserDynamics or -- heck, against
12 Garretson's entire market value rule argument. You go
13 back in time.

14 But here's the reality of it, Your Honor.
15 This is the total revenues, 182 -- \$182 million -- or
16 \$182 billion, Your Honor. And that's just Apple as an
17 example. They end up being the much larger party here
18 based on the fact that certain percentages work out much
19 more in their favor.

20 For instance, people perceive Apple as
21 being the content leader, they don't perceive Samsung as
22 being the content leader, so therefore the Motivated To
23 Buy people are higher for Apple than they are for
24 Samsung.

25 People tend to buy Samsung not for those

1 reasons, and so their damages number, although they may
2 sell as many devices as Apple, is significantly smaller
3 because the way the analysis was done. But we didn't
4 take \$182 billion. That's not part of our analysis.
5 It's patently false that we did that.

6 What we did was take the Motivated To Buy
7 question for the Apple App Survey and we -- we took that
8 Motivated To Buy which people -- I believe is about
9 17 percent said they were motivated to buy their device
10 for the access to the App Store.

11 Very simple question, very simple to
12 understand. And yes, all of our experts testified that
13 they believe that meant -- at least -- at least it's my
14 understanding as I sit here -- believe that meant only.

15 So that led to \$32 billion being left
16 over. And that's the bottom right, Your Honor. So,
17 that's -- that represents 17 percent of the total
18 revenues. And that's -- we're just talking about the
19 revenue base right now, Your Honor. We're not talking
20 about the damages or the royalty rates or anything like
21 that.

22 So, that's an 83 percent apportionment.
23 That means 83 percent of Apple's devices we asked for a
24 zero dollar royalty. Not because they don't infringe,
25 not because the product doesn't use the invention, not

1 because it's not important. I don't think anybody in
2 this room with a smartphone hasn't, you know, purchased
3 an app at some point. So we're all here; we've all got
4 our phones.

5 We reduced it down to people that thought
6 it was critical. And that's what we did. We went from
7 the top down to the critical people. And we didn't need
8 to do that. We could have done a different analysis for
9 those 83 percent of the people, but we didn't do that.

10 We conservatively estimated zero royalties for
11 83 percent of the persons with the Apple iPhone or other
12 devices.

13 So we go from there. And so what I would
14 tell Your Honor is we're -- we're analyzing the at-risk
15 profit right now. We are not in the entire market value
16 real world. This is apportioned at-risk profit that
17 we're talking about.

18 But even assuming that the parties -- the
19 defendants are right, that we are entire market value
20 rule, let's talk about that then. And that's where
21 LaserDynamics comes in, not Wecker but on Mills.

22 And so we go to that. We go to that -- I
23 think it's probably a good time to tell you -- to say
24 this. Okay. So, when we were doing this opinion -- the
25 VirnetX opinion is up on appeal at the Federal Circuit.

1 And my counsel and I, we all had a lot of conversations
2 about what to do given that the worse case scenario
3 could happen out of the Fed. Circuit.

4 Lots of things could change. What do we
5 do? So we said, Let's prepare for the worst. Let's
6 prepare for the very worst that would could happen out
7 of the Fed. Circuit, assuming they do anything with the
8 opinion. And we did that. And that's why we ran the
9 survey, and that's why we did these extra steps that
10 nobody does in these cases. And we did these extra
11 steps and went through this process.

12 And what I will tell the Court -- I think
13 Your Honor's familiar with my arguments in the VirnetX
14 case. Nothing that we said in the VirnetX case about
15 the surveys or about entire market value rule, none of
16 these things were overturned by the VirnetX opinion, not
17 one thing.

18 VirnetX opinion was cited in this Daubert
19 a couple of times, I think with insinuation that was the
20 case. Absolutely nothing. In the surveys that Apple
21 ran, held up at the Fed. Circuit. They just -- they
22 just can't split them the way they were split in that
23 case before the Fed. Circuit. And then small sellable
24 unit, they change the law. Nothing you can prepare for
25 when they change the law.

1 But we're not in this situation here.
2 We're squarely talking about LaserDynamics. And so to
3 that, I want to walk through LaserDynamics with the
4 survey and show the Court what we did.

5 Can I get the document camera, please?

6 Okay. This is from LaserDynamics; this
7 is page 25. This is just a PDF, so I don't have that
8 specific cite, I apologize. And so, here's -- here's
9 what we're talking about.

10 In LaserDynamics, they unequivocally used
11 every single laptop's entire revenue and they multiply
12 it. We didn't do that. But again, assuming that the
13 Court believes that we're still in the entire market
14 value of our world, let's go forward on that analysis.

15 First, we say because LaserDynamics
16 failed to present evidence showing that the patented
17 disc discrimination method drove demand for laptop
18 computers, in LaserDynamics there was no evidence, there
19 was no survey run. There was only evidence that
20 basically people liked disc drives. That was the only
21 evidence in the case according to the Federal Circuit
22 opinion.

23 Next thing, It is not enough to merely
24 show that the disc discrimination method is viewed as
25 valuable, important or even essential to the use of the

1 laptop computer.

2 Your Honor, we didn't do that. We're not
3 talking about, Hey, people like this. It's important.
4 That's why 83 percent of people have disappeared off the
5 map in our damages analysis because we didn't stop
6 there. We could have stopped there but with regards to
7 a different kind of analysis. We didn't do that because
8 we believed we were going to follow this opinion.

9 So, what do we -- and I apologize. Can
10 we flip back? Where do this a couple of times.

11 So, first question out the gate we ask
12 is, Do you use the accused feature? And we list it by
13 product and we list it by how often you use it, and we
14 found it was a very large percentage of the population
15 used the feature.

16 Again, we did that because we wanted to
17 know how online our survey was with Apple's survey. We
18 wanted to know how important our feature was. We didn't
19 use that to stop and say said that's what our analysis
20 was. So we went and got the evidence from
21 LaserDynamics, step one, but we didn't stop there.

22 So then we go to step two of
23 LaserDynamics.

24 Only two more times. One more time back
25 to this, please. Thank you.

1 Step two of LaserDynamics talks about,
2 well, if you have two otherwise equivalent laptop
3 computers and only one of which practices the -- the
4 patent improvement, proof that consumers would choose a
5 laptop computer having the disc discrimination
6 functionality says nothing as to whether the presence of
7 the functionality is what motivates consumers to buy a
8 laptop computer in the first place.

9 And what that's talking about, Your
10 Honor, is affirmative purchase decisions versus -- only
11 other way to say this is negative for commercially
12 viable purchase decisions that, yeah, generally people
13 would choose the more features, but they don't go there
14 to purchase the product with the more features.

15 And so we -- we ask the question -- and
16 again, I apologize, back to the slides.

17 So, here we ask the question -- and this
18 is where we took the non-infringing alternative, the
19 best ones we could identify. And the question is,
20 Suppose that the feature at the App Store application
21 that allows you to browse for and purchase and install
22 the apps offered for sale were disabled on your device,
23 instead -- and now instead you could browse for and
24 install apps offered for sale, but before using the app
25 you'd need to complete each purchase by separately

1 visiting a website, enter your payment information to
2 unlock the app.

3 And so here we're presenting to the jury
4 the step two of LaserDynamics. Ladies and gentlemen, if
5 you -- the purchased product that you bought didn't have
6 the feature that it has on it now but it had a more
7 difficult or non-infringing feature on it, would you
8 still have bought it at the price you paid for it?

9 Okay. So that's what we asked, and a
10 good percentage of people said, No, I wouldn't have
11 bought it at the price I paid for it.

12 We didn't stop there. We go to the next
13 step. The next step we took was, well, how about if we
14 gave you a discount, would you still have bought it?

15 And so we took the discount now and we
16 said, Okay. Now, would you have bought it but for this
17 discount? And they -- a number of people said, I don't
18 care how much you discount it, I don't care if you put
19 it down to a hundred dollars, if you make me do this
20 non-infringing alternative, I don't want this product.
21 I'm done; I'm out; it's over.

22 But again, Your Honor, there's all kinds
23 of analysis where we could have stopped there and we
24 didn't do that. We took the final step --

25 One more time -- one more time, please,

1 back to the docket camera. Thank you.

2 We took the final step. And here's what
3 LaserDynamics asked us to do. In this case,
4 LaserDynamics' expert never conducted a market survey or
5 study -- or a consumer survey to ascertain whether the
6 demand for laptop computer is driven by the patented
7 feature.

8 On the record before us, the patented
9 method is best understood as a useful -- useful
10 commodity-type feature that consumers expect will be
11 present in all laptop computers.

12 We're well beyond that second sentence in
13 this. The evidence in this case will be unargued that
14 it's an important feature, App Store's critical, that
15 all these defendants' documents are going to say that,
16 about each other even, Your Honor. So we're gone now.

17 So we took this step, we conducted our
18 survey, we asked all those three prior questions, and
19 then last time --

20 Back to my slide, please, and I promise I
21 won't do it to you again.

22 So we ask the final question, for each
23 device listed below, did the capability to purchase apps
24 from the Apple's App Store, Google's Play Store, Android
25 Market or Samsung App -- and that question was basically

1 delineated by what you said you had. You said you had
2 an iPhone, we asked you about the iPhone, and says, Did
3 that motivate you to buy this device?

4 Simple, easy question. Yes, no, or I
5 don't know. If you thought, hey, maybe this and
6 something else motivated me to buy it, I'd say no or I'd
7 say I don't know. But if this was the feature that
8 motivated me -- motivated me to buy, I'd say yes. And
9 that's how it worked.

10 And we got that analysis back. We got
11 those numbers back. And those are the numbers, Your
12 Honor, that were used to apportion the royalty base
13 down, was based on this question, a portion of the
14 royalty base down to the 17 percent of the iPhones -- or
15 iPhone or IOS devices.

16 And like I said, Your Honor, I believe
17 with Samsung it was 11 percent, I think in HTC it was
18 some percent around there, but I don't have those exact
19 memorized.

20 So -- and we didn't stop there, Your
21 Honor. We took this analysis in line with the three
22 questions prior and we took the relationship between all
23 those together and we said, Let's determine the at-risk
24 profit.

25 And so we said this. If the guy's

1 motivated to buy it, but he said he would buy it at a
2 discount, we're going to give that to Apple. If the guy
3 said he wasn't motivated to buy it but he uses it, we're
4 going to give that to Apple. Zero royalty. No royalty
5 at all.

6 So, if Apple -- even though Apple and all
7 these guys here say they would never do a discount for
8 something like this, we still gave them credit and said,
9 We assume you still would have captured some of those
10 guys. In fact, we assumed you'd capture them all. We
11 said 0.0 royalty for 83 percent of the devices. I think
12 with -- Samsung might have been 90 percent of the
13 devices. It ended up being larger than Apple's.

14 Then the analysis comes down to what we
15 did, which is we take the credit for the people who are
16 motivated to buy, who also said, I don't care what you
17 did to this thing price-wise, I don't want that
18 non-infringing alternative, and I'm not buying this
19 device with that. I was motivated to buy for this
20 feature and I wouldn't buy another product.

21 And those are the people that are our
22 royalty. That's where our reasonable royalty came from.

23 And their own experts agree and admitted
24 that the vast majority of the revenues in this case are
25 out. They're not even part of this case, and that our

1 royalty is a percentage of a percentage of a percentage
2 of a percentage.

3 And the only argument they have against
4 that, Your Honor, is to say, Well, Your Honor,
5 multiplication is associative, and so since
6 multiplication is associative, this is an entire market
7 value rule case. And that's the argument they've got.
8 That's what it boils down to.

9 And so that's with regard to survey, but
10 it doesn't stop there, Your Honor. We could have used
11 Apple's surveys. We could have used Samsung or HTC's
12 surveys. And the biggest argument -- and I call it the
13 double yes argument -- that Mr. Verhoeven and Apple --
14 they all have is that, Well, why would somebody in all
15 these surveys say yes to all these questions if they're
16 truly answering them motivated to buy?

17 Well, the answer is there is nobody who
18 answered all those questions and said yes to all those
19 things. That is a bold-face lie. Those surveys were
20 separately tested. There is no soul, no soul who
21 answered, I would buy my iPhone for the App Store and I
22 would buy my iPhone for Books. There is not a soul.

23 Those surveys were done separately, and
24 what they've done is they've taken the similar features
25 that were run in each survey and they collected them

1 together and they add them to other surveys that are not
2 related to those surveys and made it look as if we get
3 over a hundred percent, and that ignores a number of
4 very large issues in the surveys, which is what I just
5 said, Your Honor.

6 They're separate surveys. They were not
7 done all together with the same population, one. Two,
8 the double yes within a survey, for instance, the movie
9 surveys -- let's see if I can get to it real fast, Your
10 Honor. The movie surveys. Example. When we ask the
11 movie survey, we asked the same population of people,
12 Your Honor, about renting and downloading and about
13 purchasing and downloading.

14 Now, those are very, very closely related
15 features, both of which are related to our patent, both
16 of which are patent enables. Those are very, very, very
17 close features, so it does not surprise us that the same
18 person might say yes to those two things because those
19 are similar if not the same feature.

20 And so what's happened is there's a
21 little bit of shuffling of the numbers to try and show
22 Your Honor that we're getting over a hundred percent.
23 But it gets further than that. If you look at the
24 numbers up here on the board, Your Honor, at the far
25 right, the people who said yes on the iPhone amounted to

1 8.9 percent.

2 Do you see that, Your Honor? I don't
3 have a laser pointer. 8.9 percent at top right.

4 Well, that is the -- that's the middle --
5 that's -- what's the word? Mean -- the meaning of the
6 number? That's not what Mr. Mills used. Mr. Mills used
7 the lower confidence interval in order to account for a
8 number of economic factors in this case. He used that
9 5.45 percent, which is the lowest one.

10 And Your Honor understands how that
11 works. Everybody does. There's a survey that gets done
12 in politics, it says, We believe X guy is going beat Y
13 guy by 5 percent, but there's a plus or minus 3 percent,
14 which means he could win by as much as 9 percent but he
15 could lose by as much as 2.

16 That's the scenario here, except we
17 assume the standard deviation away from our analysis.
18 And we took the lowest number, 5.45 percent, and that's
19 where we are. We're at the lowest standard deviation,
20 and we took that in our analysis.

21 That's not the number they add up, Your
22 Honor. The number they add up is back to the mean
23 again. So it's not the number we're using.

24 And again, Your Honor, those numbers
25 here -- the people who answered this survey here didn't

1 answer the other surveys, but they act as if they did
2 and they add them all up together.

3 But even assuming that one person did
4 answer all those surveys, Your Honor, all of those
5 surveys are very, very, very similar technological
6 issues of getting content.

7 And so it's not a surprise, even if it
8 were to go across the mall, that someone would answer
9 that way saying yes to that because it's -- it's
10 unequivocal that Apple's devices have been driven by the
11 availability of content. Unequivocal. If they get up
12 and tell me otherwise, I'd be shocked.

13 And so, to go back and show Apple's own
14 surveys also supporting this analysis, it's easy enough
15 to go back to their own surveys. Here in 2011 -- that's
16 another issue they say. We took the study in 2014, so
17 how can we apply it backwards in time. This is the
18 reason why. Use apps from the App Store comes out to
19 66 percent of -- of users plan to use it that way.

20 On the next slide, in 2013, when you look
21 at use App Store, it's 52 percent. It actually went
22 down. Our analysis over time is conservative. 2014 is
23 actually a time when the content stops being as
24 important as it used to be regards to Apple's devices,
25 and we've got the surveys to prove it.

1 But more to the point, Your Honor, is
2 this. When Apple -- when Apple asks surveys, they ask
3 people, Pick two things that are your drivers. They
4 say, What are your two drivers? Give us two.

5 And when they ask the question -- if
6 these guys are right, that our survey question is asking
7 the wrong question, then our number should be the same
8 as their numbers. Because if they're right and people
9 understood the question to mean this is one of many
10 features, then we should get the same number they get.
11 We don't. 17 percent is our number. That's the number
12 in the App Store.

13 Access to the App Store, 74 percent in
14 the United States. 74 percent. That's five times our
15 number. Five times our number. We are clearly asking
16 the question we needed to ask.

17 We're asking the question, which is, Are
18 you motivated by this feature? And what's happening in
19 these surveys here, Are you motivated by this or a few
20 other features? And when it's motivated by a few other
21 features, it's a massive percentage.

22 Their own surveys prove us right, that
23 people understood question to mean this is the motivated
24 feature. And if they didn't understand it, Your Honor,
25 they'd say I don't know, because Dr. Wecker allowed for

1 that conservatively against Smartflash.

2 And Dr. Reibstein's own admission is that
3 the number would have been higher for us had we not had
4 an "I don't know," in there because people who had
5 opinions but decided to not guess said, I don't know.
6 So there are those surveys.

7 Then their own documents -- this is what
8 I'm talking about, Your Honor -- Apple generated 42
9 percent volume share through App Store launch in
10 July 2008. That's exactly what we're talking about in
11 this case is this -- this functionality in the App
12 Store.

13 That's not an Apple document, Your Honor.
14 That's Samsung. That's Samsung's own admittance that if
15 we don't get into this industry right now, Apple is
16 killing us by doing this. So, what does Samsung do?
17 They copied Apple. Created the same store. And so the
18 point is these guys know full well that this is critical
19 to them. They understand that.

20 This case is not a situation of a date
21 picker or some sub-feature of a laser disc drive. This
22 is the feature that helps them drive these products.
23 And -- I mean, how many commercials do you hear, There's
24 an app for that, there's an app for that, there's an app
25 for that?

1 What does Samsung do to -- to go back on
2 that? They did the same thing. Oh, we have other apps,
3 and apps, apps, apps. That's -- that's what this is
4 about.

5 So, the last -- the last thing they do is
6 they say this, Your Honor. You know what, Your Honor,
7 you know why we know their question's wrong about
8 motivation, because it's just not possible. That's why.
9 It's just not possible. The smartphone has got so many
10 features on it there's just no way a single feature can
11 drive it.

12 And what that is, is a number of years of
13 taking Fed. Circuit opinions and shoe-horning their
14 business model into the Fed. Circuit opinions to try and
15 come into courtrooms and kill patent analysis.

16 Say, finally, to this date, they've never
17 said it before, Your Honor, never said a single feature
18 could -- couldn't drive it. Never said an opinion. The
19 Fed. Circuit's never said in any of its opinions that a
20 single feature couldn't drive a multi-component like a
21 laptop or a smartphone. They didn't say that in
22 VirnetX. Didn't say it in LaserDynamics.

23 If the Fed. Circuit, you know, is assumed
24 to have intellectual honesty, which I think we all do
25 assume they have superior intellectual honesty, then

1 they would just say that in the opinion. They wouldn't
2 lay out impossible tests. They would say in there it's
3 not attainable.

4 VirnetX you can't possibly prove that
5 they have a single feature driving the product instead
6 of saying here's the test for that. Go run a study.
7 They would never say that.

8 And you know why we know that's right?
9 Dr. Reibstein admitted it. Un -- unasked for, he said,
10 Yeah, when I looked into buying my car -- you know, I
11 went to buy my car with full features.

12 Mr. Pearson says, So what -- what if I
13 want -- what if I want a convertible -- oh, that's his
14 answer. Sorry. Can you tell us what that is? What
15 were the features?

16 And he says, What I wanted was
17 front-wheel or four-wheel drive and those are the two
18 primary factors. And I might note, by the way, that
19 most people -- well, an automobile is a very complex
20 product but most people make decisions on small
21 dimensions that happen to be important to them.

22 And that's what we asked about in our
23 survey, Your Honor. We tried to figure out what it was
24 that was motivating these people. That's what we asked.

25 And then we asked Dr. Becker about the

1 same thing. I said, I just want to be clear. Apple's
2 position is you can't ever, you know, have an Apple
3 iPhone sale motivated by single future?

4 I'm trying to understand. Are you
5 conflating usage with motivated to buy?

6 He said, No, those are two separate
7 things. As I've got on the screen here.

8 And I said, I just want to be clear about
9 this. So, if a user of a device had a single feature
10 that drove him to purchase a device, if he even later
11 regularly started using the device in some other fashion
12 other than the reason he bought it, you don't believe
13 that would break his reason to purchase a device -- his
14 drive for the purchase of the device, right?

15 He says, No, you can't. It doesn't go
16 back in time and undo your hypothetical that that's
17 what's driving it. He said, If they become a regular
18 user of some feature, that would be a reasonable thing.
19 It reduces the probability that their next purchase
20 might be driven by that one feature. But once the
21 purchase has happened, the motivation's done.

22 Their own expert is admitting that people
23 go to the store; they pick a single feature; they pick
24 their device; they buy it. Just because they go and use
25 it for a whole lot of other things, like all the things

1 that were listed by Mr. Verhoeven, has nothing to do
2 with whether they were motivated by a single feature
3 like we said in the survey.

4 And ultimately, all the features that
5 Mr. Verhoeven put out in front of you are on a flip
6 phone, Your Honor. And their own witnesses have all
7 said smartphones, it's about having App Store and it's
8 about having apps. That's what they've all said, and
9 that's what this case is about. And at the end of the
10 day, there's no reason that the analysis we put forward
11 with this survey shouldn't support that.

12 So with that I'll close.

13 THE COURT: Okay.

14 MR. VERHOEVEN: Thank you, Your Honor.
15 I'll try to be brief. And I do have a couple of
16 follow-up ones.

17 THE COURT: Okay.

18 MR. VERHOEVEN: Do you want to take a
19 break now, Your Honor, or should we keep...

20 THE COURT: I'd rather just push through
21 this motion, but we -- we do need to take a break, so...

22 MR. VERHOEVEN: I'll try to be brief.

23 Smartflash -- counsel for Smartflash went
24 through a series of slides saying they were very
25 carefully applying the LaserDynamics test when they did

1 this survey, and they were very careful, and he went
2 back and forth, you remember, from ELMO to the slides
3 showing how the survey tracks LaserDynamics. We didn't
4 hear that argument in their brief, Your Honor.

5 Can we have slide 32?

6 In their brief, they claimed
7 LaserDynamics is irrelevant to our motion and that
8 LaserDynamics is irrelevant to the Wecker opinion. They
9 say LaserDynamics doesn't apply. It's a theory on which
10 it does not rely. So, now they've completely changed
11 from their opposition and they're saying no, Your Honor,
12 you should believe that we carefully tracked
13 LaserDynamics in the way we did this survey.

14 Those two things can't both be true.
15 There's no question that the standard in LaserDynamics
16 is sole motivation, or as they call it motivated by a
17 single feature. That was not tested in the Wecker
18 analysis.

19 Now, one of the things that counsel for
20 plaintiff said is that the entire market value rule
21 doesn't apply, so therefore LaserDynamics shouldn't be
22 rigorously needed to be followed. That's not true.
23 That goes more to the Mills motion, Your Honor, so I'm
24 not going to address the entire market value rule.
25 Counsel for Apple will do that.

1 But -- but the fact of the matter is that
2 Mills admits it, Your Honor. And you saw --

3 If we could go back to slide 8.

4 He used the question regarding motivation
5 to purchase, he said, when he did the royalty based
6 calculation. Why did you do it that way? We looked at
7 this, Your Honor. He did it because of LaserDynamics.
8 Okay. He's doing the motivation question because of
9 LaserDynamics. That's what their expert says, not their
10 lawyers trying to get out of it.

11 LaserDynamics applies to this case. They
12 know it and that's why they gave up their first
13 argument, and now they're arguing that they carefully
14 tracked it.

15 Another point I'd like to make, Your
16 Honor, is you saw counsel put up a bunch of questions
17 from the survey implying that Mr. Mills used those
18 questions in determining whether there's motivation.
19 That's not true. And what's more important, Your Honor,
20 is we're not moving on those questions.

21 Could we go to slide 5?

22 We're moving on the questions on which
23 Mr. Mills relied to do his calculations, were the
24 motivation-to-buy questions. And he tied those directly
25 to LaserDynamics. So pointing to some other questions

1 in the survey to try and confuse the Court is not going
2 to cut it.

3 The double counting, Your Honor.

4 Go to slide 16.

5 I was accused of bold-face lying by
6 putting up this aggregation of charts. These are the
7 same respondents answering the question, motivation, for
8 different features. Yes, I stand behind that. I
9 double-checked after I heard that with my team. I guess
10 I -- I just have to be called a liar on that.

11 MR. CASSADY: Next slide, Your Honor, not
12 this one.

13 MR. VERHOEVEN: Let's keep going. Oh, so
14 this one I guess they admit that the same respondents,
15 then, answered motivation questions on different
16 functionality the same. So I guess that's not disputed
17 then, Your Honor. It's an undisputed fact.

18 As a matter of logic, they could not have
19 interpreted that -- those questions to mean sole
20 motivation. And we can say that. They have no
21 pretests. And I want to get to next, the pretest. They
22 didn't do any testing to verify.

23 They're standing up here saying to you
24 that they did all these -- or that these -- Trust us,
25 these respondents interpreted this as sole motivation,

1 but they didn't do anything to test it, Your Honor.

2 Bear with me as I work through my slides.

3 If we go to slide 26.

4 The only test that was done by Dr. Wecker
5 was one of four surveys, Your Honor. It's undisputed
6 that Dr. Wecker did not pretest any of the motivation
7 questions, period, full stop. There's no -- and no
8 pretesting was done with these respondents to say, Do
9 you interpret this to mean sole or multiple? So, they
10 can say that to you, but they didn't pretest. We have
11 in our brief every authority says you're supposed to
12 pretest.

13 Mr. -- Dr. Wecker says it's recommended
14 to pretest. He actually did pretest and made
15 adjustments on the one -- the one survey that didn't
16 have the questions. You've been told repeatedly --

17 If we could go to slide -- just one
18 second, Your Honor.

19 Slide 35.

20 In the brief, the statement is made over
21 20 times, in the opposition brief, that this all goes to
22 the weight. It doesn't go to admissibility. But this
23 isn't true in this case. This is a test propounded by
24 the Federal Circuit.

25 If you take a survey to meet that test

1 that doesn't match the holding, and it's clearly -- as
2 we can see from the results -- not consistent with the
3 holding, that is going to be found to be reversible
4 error.

5 The Federal Circuit is all over damages
6 now days, and we got to follow these tests they put out.
7 And there's no question under LaserDynamics that if
8 you're going to rely on LaserDynamics, it's sole
9 motivation. It's undisputed. Single feature motivates.

10 Bear with me, Your Honor.

11 There were a number of arguments that
12 were made, Your Honor, concerning Mr. Mills and it
13 overlaps with Mr. Mills' analysis. I'm not going to
14 address the Mr. Mills' arguments because our motion
15 right now is Dr. Wecker, so I won't address that in the
16 interest of time.

17 And if I could just confer with counsel
18 to see if I've left anything out.

19 With that, Your Honor, I'll sit down.

20 THE COURT: Thank you.

21 MR. CASSADY: Can I get 60 seconds?

22 THE COURT: Yes.

23 MR. CASSADY: Can I get slide 16 of yours
24 Mr. Verhoeven, please. Of yours, please. Sorry, their
25 slides. Thank you. I know I've been difficult to you,

1 I apologize. Their slides. Sorry. There we go. Okay.

2 So, Your Honor, with regard to slide 16,
3 this is the issue of the percentages they're showing and
4 the individual lines there relate to the super similar
5 functionality. So movie rental, movie purchase. That's
6 what this was right here. This is not the one that was
7 not true. This one, these numbers are there.

8 What we're saying is that what the
9 analysis they're taking of this is illogical, that based
10 on the way the survey is asked and who was asked it, it
11 makes sense that the features are so similar that they
12 would answer this way. It doesn't -- it's not
13 inconsistent with our understanding.

14 Next slide, 17, please.

15 This is the lie.

16 MR. VERHOEVEN: Your Honor, I object.

17 THE COURT: Okay. We're not objecting.

18 So -- Mr. Verhoeven, Mr. Verhoeven, we're not objecting.

19 It's his turn to talk. I'm going to let him talk.

20 MR. CASSADY: This is not the same
21 people. None of these are the same people. Sixteen
22 percent said rent and download did not answer the
23 question for purchase and download books. But they make
24 it sound like those are the same persons saying that so
25 they get to say, see, they got to a hundred percent of

1 the people. That's just patently false.

2 And then also, Your Honor, we didn't rely
3 on all the numbers. We took the single survey and
4 relied on the single survey based on the time frame that
5 the inventor was in.

6 And then with regard to LaserDynamics,
7 the reason I went into it, and I think I told Your
8 Honor, LaserDynamics is irrelevant to Wecker. He ran a
9 survey. It's -- it is polished and fine. He's done it
10 in all the normal practices. He's got experience in the
11 world of doing surveys. They're relevant. They should
12 come in. The question mark is Mills. I had no choice
13 but to walk into Mills because that's the attack they
14 keep making is LaserDynamics.

15 And then finally, with regards to the
16 motivated question, even if they're right and motivation
17 doesn't solely go to the single feature, it doesn't
18 matter because Mr. Mills' analysis took into account
19 only the people who said after motivation, they would
20 have walked away from the product line. He mixed those
21 two things together in order to come to his number. So
22 he took every factor in LaserDynamics and put it into
23 his analysis. And Dr. Wecker simply ran a survey to
24 help them facilitate that.

25 And with that, that's all I've got, Your

1 Honor. Thank you.

2 THE COURT: All right. We're going to
3 take our afternoon break. We'll be in recess for 15
4 minutes.

5 (Recess.)

6 THE COURT: Please be seated.

7 All right. What's next?

8 MR. VERHOEVEN: Good afternoon, Your
9 Honor. I just want to give you an update before we get
10 to the next motion, which is Mills. As I said before,
11 the parties agree to try to use equal time. By our
12 calculation, defendants have used 41 minutes and
13 Smartflash 73. I spoke to them over the break. They
14 still say they're going to try to keep it with equal
15 time, so we'll see how it goes.

16 THE COURT: Okay.

17 MR. BATCHELDER: Good afternoon, Your
18 Honor. James Batchelder again for Apple. The next
19 motion up is the Daubert, moving to strike Mills who is
20 their -- Smartflash's damages expert.

21 Counsel said that the attack on Mills --
22 I believe he said it was a death by a thousand cuts.
23 And what I wanted to do was start out by showing you the
24 math that Mr. Mills uses to show that it's actually
25 really a couple of just fundamental problems with his

1 calculation and his approach that renders what he's
2 doing fundamentally unreliable.

3 So, let's start out with his royalty
4 base. On the left you have the motivate percentage.
5 That's the answer to the motivate question. And there's
6 this formula, total units times total revenue over total
7 units, but, of course, total units cancels out, and so
8 the royalty base simply becomes motivate question times
9 total revenue. That is the royalty base that Mr. Mills
10 uses. And so the fundamental question is, does that
11 motivate question that he uses, is he using it to
12 measure what he really does measure.

13 And as you will see in a moment, as Mr.
14 Verhoeven has touched on, what he's using it to measure
15 is did X feature alone motivate the purchase of this
16 product. And that's not what he asked.

17 What was asked was, Does X feature
18 motivate you? And, of course, multiple things can
19 motivate. And so, his reliance on that, that's the only
20 thing that he uses to apportion the royalty base. And
21 it's fundamentally broken as a result of his reliance on
22 a question that doesn't ask what he relies on it to
23 measure.

24 And moving on to the royalty rate. This
25 is a much fancier formula, but again, many things cancel

1 out. So those two total units cancel out. These total
2 revenues cancel out, these total units cancel out, and
3 so what you're left with on the royalty rate is, again,
4 a survey question that, the would not buy question
5 multiplied times contribution margin, which is simply in
6 Apple's case just profits.

7 And so the entire royalty calculation
8 comes down to base times rate, total revenue and
9 contribution margin multiplied by each other are total
10 profits. So you just have total profits multiplied by
11 two survey question outcomes. And that's just how
12 important these survey questions are to the Mills'
13 calculation.

14 Again, the motivate question is the only
15 thing that it uses to apportion the base and that's
16 fundamentally broken. And the would-not-buy question is
17 the only thing that uses the apportionment rate, and
18 that's broken as well for reasons I'll get into in a
19 moment.

20 But let's start with the motivate-to-buy.

21 Can we see 17, please, Mr. Pierce?

22 So there's the question. It's did X
23 feature motivate you to buy the device.

24 He didn't say was X feature the only
25 feature that motivated you to buy, didn't say, did X

1 feature alone motivate you to buy. Could have but
2 didn't.

3 And Mills' excuse for relying on the
4 survey for doing it this way, as Mr. Verhoeven's already
5 pointed out, is, well, that word motivated appears in
6 the LaserDynamics opinion. That was his reason.

7 So, what does LaserDynamics say? It says
8 did the feature alone motivate. The fact that the word
9 motivate shows up in the opinion doesn't justify relying
10 on a survey that just says did X feature motivate, when
11 the opinion says it has to be that feature alone.
12 Again, that could have been asked but it wasn't. It was
13 designed not to capture that information.

14 And here's what Mr. Mills says about it.

15 I'm sorry. Can we have 22, please?

16 Thank you.

17 So again, the question is on the left,
18 The Motivate Question. And on the right are the
19 questions that I asked him. And the bottom one was, In
20 conducting that apportionment -- because he admitted
21 that was the only thing he used to apportion -- are you
22 assuming that the Question 4 App Store functionality is
23 the only functionality that motivated the respondents to
24 buy the device if they answered yes?

25 His answer is, Yes.

1 So he assumes that motivated by this
2 feature means motivated only by that feature even though
3 no one asked the question.

4 And I reworded the question.

5 Can we see 30, please?

6 I reworded the question for him. So you
7 see on the right I said, The reworded version is: For
8 each device listed below, was the capability to purchase
9 apps from Apple's app store, Google Play store, et
10 cetera, the only functionality that motivated you to buy
11 the device? That's the reworded question.

12 And, My question now is, does that
13 reworded question in your mind mean the same thing?

14 His answer: I think there is a slight
15 difference in meaning.

16 And I asked him why, and he said: The
17 way that you phrased question seems to foreclose any
18 possibility that there is another feature that had input
19 in the purchase decision.

20 So he admits that if it had been reworded
21 to ask what he relied on to measure, it would have meant
22 something different. That breaks his apportionment of
23 the base.

24 So I tested it further. On slide 31, I
25 asked him to consider a hypothetical.

1 Say a given respondent answered yes to
2 Question 4 but was also motivated by, say, three other
3 features to purchase the reference device.

4 Are you with me so far?

5 Answer: Yes.

6 Question: For such a respondent, a
7 reasonable royalty calculation would need to apportion
8 as between the motivating feature attributable to the
9 patents-in-suit and those motivating features not
10 attributable to the patents-in-suit, correct?

11 Answer: I would need to consider that,
12 yes.

13 So, if the question asked what he had
14 relied on to mean that people actually -- were actually
15 motivated by other features -- because the question
16 leaves room for that as he acknowledged -- he would have
17 to redo his calculation. He would need to consider
18 that.

19 And we know -- apart from the fact -- I
20 mean, I'll just say this, Your Honor. Let's go back to
21 the question. Again, the question is, Did X feature
22 motivate you to buy?

23 If I order a mushroom and pepperoni
24 pizza, and someone asked me, Do mushrooms motivate you
25 to buy that pizza, I'd say sure.

1 If they asked me did pepperoni motivate
2 you to buy that pizza, I'd say sure. Truthful answer to
3 each of those questions is yes. And there are probably
4 some other things like, I happen to like the crust at
5 that restaurant and the spice level of the sauce.

6 But if you ask did X feature motivate
7 you, and that's all you ask, you can't exclude the
8 possibility that other things are motivating you. In
9 fact, it would be an illogical assumption, and yet
10 that's the only assumption that drives the entirety of
11 his apportionment of the base.

12 Can we see 26, please?

13 Now, here are a couple of examples where
14 the same respondents were asked did X feature motivate
15 you and did Y feature motivate you. And if the survey
16 question meant what Mills said it does, what he relies
17 on it to mean, no one would ever say yes to both because
18 they're different features.

19 And here we have, for example, one of the
20 questions, the top question, number 5 is about
21 capability to purchase and download books. That's X
22 feature. Number 6 is -- it's about books and parental
23 controls. Those are not the same feature. They're not
24 even highly overlapping features.

25 And yet many of the respondents across

1 the devices, 28 for the iPhone, 19 for iPad, 12 for the
2 iPod Touch, many answered yes to both, and that shows
3 you the respondents in this survey did not interpret
4 motivate to mean what Mills relied on it to mean. His
5 only apportionment of the base is broken and their own
6 survey proves it. It's not reliable. It can't be used.

7 33, please.

8 Royalty rate. Would not buy percentage
9 times contribution margin. We looked at that at the
10 outset.

11 36, please.

12 I asked him, Do you agree with the idea
13 that some portion of what you've called at-risk profits
14 is attributable to Apple rather than to the claimed
15 invention?

16 Answer: There are certain complementary
17 assets that create that value.

18 So he agrees Apple's adding some value to
19 this stuff. But the law says you have to apportion for
20 it.

21 37, I asked him a follow-up question.

22 You began your answer by saying that
23 there are certain complementary assets that create
24 value. My question is, Does your analysis do anything
25 to apportion as between, on the one hand, those

1 complementary assets and, on the other hand, on the
2 contribution of the patents-in-suit?

3 His answer was, No.

4 And he goes on to say, I tried to do
5 something different. I didn't apportion. I tried
6 divide between infringement and non-infringing
7 alternatives.

8 The problem with that, though, is --
9 38, please.

10 Dr. Jones -- these guys were deposed on
11 the same day, Dr. Jones and Dr. Mills, and it was the
12 scenarios of Dr. Jones that Mills was relying upon to
13 apportion the rate by dividing between infringement, on
14 the one hand, and non-infringing alternatives on the
15 other.

16 Dr. Jones, when he was deposed, he was
17 asked, Well, is this alternative that you provided in
18 your scenario? Is it really non-infringing under your
19 infringement theory?

20 And he said, Well, no. No, it really
21 isn't. There are some claims that are still infringed.

22 But Mill didn't understand that. In
23 fact, he understood exactly the opposite. I asked him
24 what his understanding was of Dr. Jones' opinions on
25 that subject that he was relying upon, and he says, My

1 understanding is that the alternatives are
2 non-infringing.

3 So, the entire logic of his so-called
4 apportionment on the rate is based on this false
5 distinction between scenarios and alternatives being
6 infringing and non-infringing.

7 Dr. Jones, a guy who came up with this
8 stuff, and rendered the infringement theory and the
9 alternative theory, he said, Well, actually those
10 alternatives are still infringing. It's fundamentally
11 broken, both the base and the rate.

12 And again, these are the only two things
13 that he's relying on to apportion anything in this -- in
14 this damages calculation.

15 A couple more quick points.

16 Slide -- I got it. Slide 40.

17 The LaserDynamics opinion makes one other
18 very important point, and that is, you shouldn't be
19 admitting, you shouldn't be putting in front of the jury
20 the entire market value, basically, the -- the full set
21 of revenues and profits of defendant because it can only
22 prejudice.

23 The admission of overall revenues, which
24 have no demonstrated correlation to the value of the
25 patented feature alone, only serve to make a patentee's

1 proffered damages amount appear modest by comparison.

2 And in VirnetX, the same thing was said,
3 It cannot help but skew the damages horizon for the
4 jury.

5 And again, in their formula, it's total
6 revenue, total profits of Apple. They want to throw
7 around hundreds of billions of dollar numbers and say,
8 Oh, we're just asking for something very modest.

9 One last point before I sit down, because
10 I know time is short. But it comes down to the universe
11 of the survey. And it's one thing in their papers when
12 we pointed out this -- that the wrong universe was used
13 for the purpose that Mills wanted to put it to.

14 They said, Well, Apple surveys regular
15 users. Why can't we do that?

16 Of course, it's fine for a company that
17 survey regular users if you want to measure the views of
18 regular users. But what Mills relies on this survey to
19 do is to measure the buying patterns and the motivations
20 of all purchasers, and yet the only thing that was
21 surveyed was regular users.

22 So I asked him: Don't you think it's
23 likely that people who use iPhones regularly, on
24 average, are going to buy and use applications more
25 often than people who use iPhones only occasionally?

1 He says: That's possible. I haven't
2 seen any evidence.

3 Question: Doesn't common sense suggest
4 it to you, sir?

5 Answer: It certainly seems like it's a
6 possibility.

7 So, he's relying on this survey that
8 talked only to regular users to measure all purchasers.
9 There's no justification for that and he had none.

10 And when we asked Smartflash about it,
11 what do they say in their brief? Sampled individuals
12 who are likely to be using the accused functionality.

13 That's what they said Dr. Wecker did.
14 Sampled individuals who are likely to be using the
15 accused functionality. You can't do that. That's bias
16 by definition. You can't steer your survey to people
17 who you think infringe and then say, Oh, people who
18 infringe tend to like this feature, therefore it should
19 be valuable, and -- and ratchet up the damages
20 calculation. You just can't do that.

21 And I should add that a fundamental
22 failure like this to survey the right population, that's
23 not something that just goes to weight. It goes to
24 admissibility.

25 And there are a few cases that we've

1 cited to, there's the 1-800 Contacts case, the J&J Snack
2 Foods case, and the Oracle Google case. All of those
3 cases struck the survey because of fundamental problems
4 like surveying the wrong population and asking a
5 fundamentally broken question like motivated by X when
6 you're really trying to ask motivated only by X but
7 don't bother to ask that question.

8 Those surveys get -- get struck exactly
9 for those kind of reasons in this survey, and the
10 reliance on it by Mills to formulate a damages
11 calculation need to be stricken for the same reason.

12 Thank you.

13 THE COURT: Response.

14 MR. CASSADY: Can I stick with your
15 slides, please? And can you go to slide -- go to slide
16 1, please.

17 Your Honor, I'll just try to briefly deal
18 with some of those things, and then obviously I think is
19 usual in a Daubert motion, I will open it for the Court
20 to ask me any questions the Court may have.

21 With regards to this issue here, I
22 already dealt with this. Their argument is
23 multiplication is associative. So, if there's
24 multiplication and division, then we can delineate down
25 in the model, say anything we want to, and try and call

1 what it is -- or call what it's not.

2 And so the situation here is he's showing
3 you the royalty base. The calculation he's showing you
4 looks like a normal damages analysis in its -- in its
5 total. That's not what that is. This is simply just
6 calculating the royalty base, and it's using multiple
7 things.

8 And more importantly, Your Honor, we do
9 not intend to, and never will, go in front of the jury
10 unless, of course, some opening of the door happens, and
11 saying \$182 billion, that's -- that's the royalty base.
12 That is not what's going to happen.

13 What's going to happen is, based on the
14 calculation that's done here, so that we don't have to
15 show the jury 181 [sic] billion, we can say, here's a
16 percentage of motivated units, here's the revenue
17 related to those motivated people, that's the royalty
18 base, and the jury won't ever know the remainder of the
19 base. And that's what that is. So that's the situation
20 and so that's the royalty base.

21 You go to the royalty rate, we -- can you
22 go two slides forward, please. That's still the base.

23 Okay. When you go to royalty rate,
24 it's -- there we go. Thank you -- there's a whole
25 lot -- a whole lot more variables that go into the

1 royalty rate like the -- the profit margin, the
2 percentage that would not buy it without the feature no
3 matter what prices actually got done. And that royalty
4 rate is applied against that portion and reduced royalty
5 base. And it's what I told you before, Your Honor,
6 that -- that 83 percent of the people in some of these
7 situations are zero royalty for.

8 Then another larger percentage of the
9 17 percent left over, zero royalty for. Only a subset
10 of a subset of a subset are getting applied -- are
11 profits that are getting allocated to Smartflash in one
12 way or another.

13 But I'll back up and I'll say -- Your
14 Honor, with regards to the motivate question, as I said
15 with regards to the Wecker analysis, we're not at the
16 entire market rule just to start with. That's not where
17 we are. We -- we apportion down the base and we did an
18 analysis related to the apportion base.

19 If the Court and if the defendants
20 believe that we are in the entire market value real
21 world, we've provided that evidence amply for those
22 things. And so, the point is that question doesn't have
23 to mean solely or alone the way the defendants say in
24 order for us to have a damage model. Only in the world
25 where this is the entire market value rule we're talking

1 about for this 17 percent of people does that question
2 have to go down that road. And in that situation, we
3 think we've provided ample evidence for that.

4 And so, let me just go to some of -- some
5 of their slides and point out the things for that.

6 So, can you go to slide 26, please?

7 Back to this one. So, books and parental
8 controls is -- that's a new example we're using here.
9 Books and parental controls. Again, it is -- it is
10 obtaining and controlling content. That's the
11 functionality we're talking about in this case.

12 And so it should be no shock to anyone
13 that people that care and are motivated by the obtaining
14 of specific types of content and controlling of that
15 content care about various versions of that. And so it
16 should be no shock to anybody. That's not a negation of
17 our motivated-to-buy question being solely for a
18 feature. It just isn't.

19 Now, like I said before, Your Honor,
20 they're not asking the same people. Here, these guys
21 got asked -- I'm not saying this -- this one didn't.
22 But all across all features, they did not get asked the
23 same question. And it's not a hundred percent plus
24 people saying yes to all those things.

25 With regards to slide 28, please. Or,

1 sorry, 38. I apologize.

2 Your Honor, with regards to the
3 non-infringing alternatives that might still infringe,
4 and Mr. Mills assumes that they are not infringing, this
5 is a pretty peculiar argument by the defendants. What
6 they're saying is Mr. Mills' assumption that some of the
7 accused functionality doesn't infringe means he should
8 get Dauberted.

9 What he did was he gave them the benefit
10 of the doubt related to those non-infringing
11 alternatives. So Jones said, You know what, I think
12 there's still an infringement reading on some of these
13 non-infringing alternatives. But Mr. Mills says, You
14 know what, I'm going to assume you get all the benefit
15 of that whether it's infringing or not.

16 And they're saying that's a criticism of
17 the way he did his analysis? And we dealt with this
18 issue. I'll put it right here in front of the Court.

19 Could I get the document camera, please?

20 This is from the brief on this issue with
21 Jones. And we say, The fact that some alternatives
22 might still infringe some claims says nothing about
23 Dr. Jones' methodology, rather it means that the
24 defendants were freely credited with the benefits of
25 that infringement.

1 I mean, Your Honor, we bent over
2 backwards to throw benefits over the fence for them.
3 You know, you get all the people that use it, get all
4 the people that would still buy it with a discount. You
5 get it all -- you get everything. It's still all there.
6 We only took the very specific people that we were
7 allocated with regards to LaserDynamics.

8 Okay. Then if we go to slide 42, please.
9 I apologize. Their slide 42.

10 Okay. The regular users. I apologize,
11 Your Honor. So with regards to this, now they're saying
12 we have a fundamental survey flaw, that we have -- we
13 have gone after regular users. And again, this one kind
14 of surprises me that this one got -- got put up in front
15 of us for two reasons, Your Honor.

16 Number one, when Dr. Wecker was asked
17 about this in his deposition, he said, I went back and
18 looked at the data and the data -- the purchasers versus
19 the users -- was insignificantly different.

20 Done. That issue's dead. There's
21 nothing there. And they bring this up.

22 Even worse, Your Honor, their own survey
23 expert, their own survey expert testified and used users
24 in his survey. I mean, I just don't know what we're on.
25 And I can show you the testimony, Your Honor, but in --

1 in saving time, I won't flip the camera and do that.

2 But Dr. Reibstein said he used users in
3 his survey. So, I don't know what we're talking about
4 here about methodological flaws when we're just doing
5 the same thing they did. Now, apparently, we all did it
6 in a blind test where we traded it over the fence to
7 each other, but that doesn't make ours methodologically
8 flawed and theirs fine.

9 So that's what I have, Your Honor.

10 THE COURT: Response.

11 MR. BATCHELDER: Your Honor, I made three
12 high level points, and I just want to come back to each
13 of them because I don't think that they were adequately
14 addressed. On the apportionment of base and the only
15 methodology for doing that is the motivate question.
16 Motivate, motivated by acts does not mean motivated only
17 by acts.

18 And there was no rejoinder to that
19 argument. The only rejoinder was to say, well, maybe we
20 don't really need it to mean that. But Mr. Mills relied
21 on it to mean that in his survey.

22 Slide 22, please.

23 Not in his survey but his damages
24 calculation he says so himself. That's the only thing
25 he used to apportion the base and he says so here.

1 In conducting that apportionment, are you
2 assuming that the Question 4 App Store functionality is
3 the only functionality that motivated the respondent to
4 buy?

5 Answer: Yes.

6 He relies upon it and that's his only
7 base apportionment.

8 As to rate, again, he needed to
9 apportion. He admitted that apportion was necessary for
10 the rate. And when I asked him: Well, doesn't Apple
11 add value to these things?

12 He said: Yeah, it does. There are
13 complementary assets.

14 Did you do anything to apportion for the
15 rate for those complementary assets that Apple is adding
16 to the equation?

17 He said: No. No, because I'm trying
18 something else. I'm using the infringement versus
19 non-infringement line.

20 And now admitted in open court, and as we
21 saw from Dr. Jones, that line is broken. Jones says now
22 it actually still infringes. So the fundamental logic
23 of his entire apportionment of the rate goes out the
24 window. He could have tried to apportion but he just
25 ignored Apple's contributions. And you just can't do

1 that. So, both his apportionment of the base and of the
2 rate ultimately falls apart.

3 And as to the regular users question,
4 the regular users in Mr. Wecker's survey, they drop
5 out of the survey. It was like the second question
6 asked. And if someone said, no, they were not a
7 regular user, they didn't get asked any questions.
8 There's nothing used to compare their outcomes. That
9 introduced fundamental bias and there's no
10 justification for it. You haven't heard any. Thank
11 you.

12 THE COURT: Okay.

13 MR. CASSADY: Just two quick points. I
14 won't even go to the podium. With regards to the
15 response regarding whether our survey actually got to
16 the only motivation issue, I spent 30 minutes before our
17 last break going through the Apple surveys that showed
18 that their numbers were drastically higher than ours
19 when it was asking the question about multiple
20 motivating features. That alone is a fact issue for a
21 jury to decide if there is an issue on only versus not
22 only.

23 And with regards to the issue just
24 brought up at the tail end about -- about the
25 infringement again, we're back to we studied a more

1 narrow aspect of infringement and got the value of that,
2 and he's saying that's a methodological flaw because we
3 didn't get a bigger amount of infringement in there.
4 The damages would have been larger if we'd done the
5 larger amount of infringement.

6 We tested a much more narrowed,
7 non-infringing alternative partly because none were
8 identified to us and, part two, because we were trying
9 to be fair in the survey rather than making kind of
10 Draconian decisions about the non-infringing
11 alternative.

12 And now Jones is being attacked and Mills
13 is being attacked for being conservative. It's just --
14 it's illogical.

15 THE COURT: Okay. All right. Mr. Curry,
16 do you have a comment on this motion?

17 MR. CURRY: Very quickly, because this
18 is -- this is a criticism that they had of Jones'
19 methodology that Mr. Verhoeven declined to bring it up,
20 but the issue of some alternatives still infringe some
21 claims.

22 So, this is how it plays out and it's
23 real easy to understand. Imagine that there are some
24 claims that are infringed only by movie rentals.
25 Dr. Jones' theory of the best non-infringing alternative

1 for those claims is movie purchase.

2 And so what he's saying is, because it's
3 the best alternative for those claims, it doesn't mean
4 that it's -- that movie purchases are a non-infringing
5 alternative for all claims. It's that simple and
6 pedestrian, Your Honor. That's all.

7 THE COURT: All right. What's next?

8 MR. CALDWELL: Your Honor, I think we're
9 down four to two on motions at this point, so it's our
10 opportunity to catch up. And what he'd like to take up
11 with Your Honor's indulgence is actually the newest
12 motion that's on your docket, I think anyway, which is
13 Docket 317, at least in the Apple case, which is
14 Plaintiffs' Motion to Enforce Compliance with O2 Micro,
15 or Resolve Claim Construction Disputes.

16 And this motion was filed 10 or 12 days
17 ago and the responses came in yesterday at noon. I
18 don't know -- I understand that that's not necessarily
19 fair to the Court in terms of -- in terms of
20 preparation, but what's happened is we've seen -- we've
21 seen something occurring over the last month or so and
22 it seems to get worse, and what it's setting up for is
23 just an absolute disaster in front of the jury, just a
24 complete zoo.

25 And I guess it's an issue that's very

1 near and dear to my heart because the last time we tried
2 a case, and -- and you were there, we were down the
3 hall. It -- that trial turned into an absolute zoo with
4 so many bench conferences.

5 And I've heard Judge Davis refer to it
6 at a bench bar in another context as basically one of
7 the hardest cases he's ever had to try. And it was
8 terrible because we were trying to follow the rule of
9 you don't reargue claim construction in front of the
10 jury, while the other side was saying things
11 inconsistent with what they had argued.

12 And I think what's about to happen is
13 something that's just perhaps at least equally as bad
14 in this case.

15 MR. GARDNER: Your Honor, if he's talking
16 about the trial that we were in, we won. I respectfully
17 disagree with that.

18 THE COURT: Okay. We are -- I appreciate
19 that, Mr. Gardner.

20 Listen, you-guys, we are down to no time,
21 so get to the merits, let me hear your argument, and
22 let's move on.

23 MR. CALDWELL: We -- in the claim
24 construction -- in the claim construction dispute, there
25 was a series of terms that had sort of a common issue,

1 and it was this issue of whether prosecution history
2 disclaimer in the oldest of the patents required
3 separate memories.

4 And what happened was you had a variety
5 of different terms like data carrier, and they'd say
6 they'd have to be two memories and they were physically
7 separate; and then they'd say memories and they'd have
8 to be physically separate. Or they would say, okay, now
9 you have use rules and those have to be stored
10 separately, and didn't really say physically separate.

11 But we went through -- we had a very
12 lengthy argument on this and the Court addressed it.
13 And what the court did was find that basically our
14 construction for data carrier was correct. There was no
15 limitation that read it to be something else.

16 And then as to the other terms, they were
17 given the plain meaning. Well, what has happened is now
18 the defendants' experts at least, presumably the counsel
19 behind us, are just seeking to recapture precisely what
20 they did not obtain through claim construction and do it
21 saying it's plain meaning. What we'll do is we'll read
22 in the disclaimer as plain meaning. And this is just --
23 it's getting worse just every time we talk on -- talk
24 with them about something.

25 And just to be clear, so what's happening

1 is, okay, okay, the judge said there's not a requirement
2 of physically separate memories, but I still read what
3 you said in the file history, and in my mind, that
4 disclaimed scope down to logically separate. And then
5 we start having arguments about what does that mean.

6 And they say, Well, I infer that it means
7 this and this and this. It is absolutely devolving into
8 a complete claim construction file history disclaimer
9 argument before the jury.

10 It just -- what's kind of telling, I
11 think, is in the briefs that got filed yesterday --
12 totally understanding Your Honor may not have had a
13 chance to look at them -- what you actually see is it's
14 such an unjustifiable position that Apple and Samsung
15 are saying the exact opposite.

16 Samsung and Apple, although they've
17 reached the same conclusion, Samsung's coming in saying,
18 Hey, our guy's just going to get that through plain
19 meaning. He's not going to look at the file history.

20 Apple's like, Oh, man, our guy's looking
21 at the file history. He's going to go find that you did
22 the disclaimer. And -- but when we look at actually
23 what happened in the depositions, they all say that.

24 I mean, Apple's first expert says, In
25 light of the Hiroya -- in light of the ground the

1 patentee gave in distancing itself from Hiroya --
2 Hiroya, yes -- there still has to be this logical
3 separation between these, but the Court says it's not
4 physical. He's going back to this Hiroya argument.

5 Very clear question. Are you saying as
6 the primary basis for your contention primarily based on
7 your understanding of the prosecution history
8 specifically respect -- with respect to the arguments
9 made to overcome Hiroya?

10 I would agree with that.

11 Apple's next guy, George Ligler. I'm
12 sorry for the long quotes, I really am. I know we're
13 short on time. But skipping to the bottom past the
14 little dash there, the definition of separately, you
15 know, separately stored from associated content in the
16 discussion of Hiroya in the file history is the one I'm
17 trying to use. So, I'm going back to the -- to the file
18 history.

19 And although Samsung is now saying, well,
20 our guy will not talk about Hiroya or the file history,
21 it's definitely not what he did in his deposition.

22 So any opinion relying on the concept or
23 construction that memories need to be physically
24 separate would no longer be applicable or relevant?

25 This was his deposition right after --

1 right after their claim construction opinion came out.

2 He says, Under the court's recommended
3 construction, that's right. I do not believe, however,
4 that the court has weighed in on whether the content and
5 non-content data must be stored separately within the
6 same physical memory. And as my report refers to, the
7 patentee did in prosecution talk about separately
8 stored, and the court decided that didn't mean
9 physically stored in physically separate memories.

10 He continues and says, It's my reading of
11 the patent specification and intrinsic evidence.

12 So, because of the timing in this case,
13 we had expert reports and then we got the claim
14 construction right around the time we were doing the
15 deposition.

16 This was literally happening in many
17 instances on the fly in the deposition or the day
18 before, and it's easy to see where it's going. And in
19 one deposition, just as -- this is what I'm really
20 afraid of in front of the jury.

21 We have Apple's expert, Dr. Ligler. He
22 says, I've got a new opinion to tell you about. I came
23 up with it yesterday. It's not in any of my reports.

24 Okay. And then, you know -- so at the
25 risk of having the Court tell me, Well, you should have

1 asked him, you were there, so -- I spent a lot of time
2 trying to figure out what it is and -- and nail this
3 thing down. And he says, though, there's this new
4 logically separate.

5 Trying to figure out what he means by
6 that I'm asking, Are two different files on a hard drive
7 logically separate?

8 In my view, yes.

9 That was in the morning. By afternoon --
10 by afternoon it had evolved: Are two distinct files
11 logically separate if one file references or links to
12 the other file?

13 Well, see, now even though there's still
14 two distinct files.

15 In the sense we've been discussing in a
16 logically separate fashion, the answer to that would
17 generally be no.

18 But it gets worse.

19 The next question:

20 Okay.

21 If I have an html page or file running on
22 my computer and it links to an html page on Bank of
23 America's server, are those two not logically separate?

24 No, they're not.

25 So, now what's happened is although

1 they've lost the physically separate, even two files
2 that are physically separated across the United States
3 or what have you are not meeting where they come out on
4 this claim construction.

5 I mean, I'm imagining this happening in
6 front of -- in front of the jury. It's just not the
7 jury's job to resolve that sort of a claim construction
8 issue, an issue that we believe has already been
9 resolved favorably for us.

10 In the interest of time, I want to kind
11 of get past this. But in the briefs that were filed
12 yesterday, the defendants are trying to loop this back
13 to something that you said in your -- in your opinion.
14 Three times in the briefs they say, basically, that the
15 report rejected the memories in the asserted patents
16 require physically separate but recognize the disclosed
17 memories are nonetheless distinct memory structures.
18 They say that a few times.

19 But if you look at what you actually said
20 about distinct memory structures, what Your Honor said
21 is that the specification discloses distinct memory
22 structures. Okay. That's your mention of distinct
23 memory structures is the specification discloses it.

24 And besides the -- the trivial fact that
25 that's a comment on the specification, it's important to

1 understand we're looking at something they argue as a
2 disclaimer from the first of six patents.

3 Then claims have been written with
4 increasing detail covering different items and different
5 structures, different kinds of memory, different numbers
6 of memories, all sorts of different things that they're
7 trying to carry forward by just generically saying this
8 patent is all about distinct memory structures.

9 Some claims recite only one memory.
10 Okay. Then actually some claims even specify that the
11 use rules and the content must be in the same memory,
12 which they're now contradicting.

13 And that's down in those implementation
14 details that -- that kind of -- I think there's five in
15 the 101 motion as we were trying to look at the -- how
16 the specifics of each things are implemented.

17 And just -- I've picked on '772, and John
18 Summers has picked on '772, Claim 26 because I think
19 it's one where just glossing over it's hardware and
20 generic stuff doesn't work. It's got lots of
21 limitations.

22 In that instance, you have one
23 non-volatile memory and everything goes in it, the
24 content and the rules and the status. Totally different
25 than -- than what these experts doing.

1 And finally, several asserted claims
2 don't mention memory. They have reading and writing to
3 a data carrier, which you previously denied their
4 attempt to say it had these two memories. So, it's --
5 it's all really something that's been -- that's been
6 addressed.

7 Also, although sometimes distinct
8 recitations mean distinct things, one structure in the
9 accused product can meet multiple elements. Just as
10 a -- as side point, but I don't know that for this issue
11 that the Court has to really get there.

12 The fact is that rather than track the
13 particulars of the various claims, at least Apple and at
14 least Samsung's expert, they expand this read-in
15 limitation about distinct memory structures to almost
16 all asserted claims even -- regardless of whether they
17 have two memories, one memory, one memory with
18 everything, or just the data carrier, which you
19 construed.

20 And in fact, the sentence that's on slide
21 12, I think from Apple's brief is pretty instructive.
22 With the Court's indulgence, I'd request if -- if the
23 Court could try to read this sentence, because like the
24 first four times or something, it meant something
25 different to me where it originally looks like they're

1 saying, okay, if they're separate memories, those might
2 have different content.

3 But as Dr. Ligler explained, his
4 conclusions regarding logically separate is limited --
5 as though that's going to happen -- is limited to claims
6 where the express language identified stored content and
7 memories that store particular types of non-content
8 data, and claims that recite use status data and stored
9 content or data.

10 So, now at this point, it actually
11 doesn't even matter if they require memory storing
12 certain kinds of data. If it merely gets to having use
13 status data or stored content, he's now got his
14 logically separate -- logically separate requirement.

15 There's lots of claims he -- he put out a
16 supplement about 10 days after his deposition, lots of
17 claims says this applies to. I just picked one for an
18 example, understanding the time sensitivity. I'll go
19 back again to '772, Claim 26, which he says this applies
20 to.

21 '772, Claim 26, says you write the
22 multimedia content into said non-volatile memory, and
23 then when it's time to check the use status data, you're
24 reading the use status data and use rules from said
25 non-volatile memory. In other words, that claim can

1 only be met where you find those two things are read, or
2 stored in, written to the same non-volatile memory.

3 But what he's doing is saying that
4 something about Hiroya, which never rose to the level of
5 disclaimer, now makes that requirement logically
6 separate. It just -- it's completely illogical.

7 I don't want to go -- I don't want to go
8 into the Markman argument itself because, one, we
9 requested two kinds of relief; one of which was just --
10 I mean, it's -- it's bizarre. I don't really know how
11 to even phrase an issue like this, but what we phrased
12 it as was Enforce Compliance with O2 Micro that claim
13 construction is not an issue for the jury. And if not,
14 we don't want the trial zoo, nor do we think it's
15 appropriate. It would error to have that.

16 So, if -- I mean, I doubt the Court
17 really wants to reopen Markman on it, but if there's
18 some dispute here that hasn't been resolved, let's just
19 knock it out the proper way because I'm confident that
20 we'll win it just as we won it the first go-round, even
21 with their fallback position. But we can't waste trial
22 time saying, aha-ha, here's your disclaimer.

23 And just as example, not to even read all
24 this kind of stuff, but we had to show the Court how
25 back in the Markman phase, in order to get their

1 constructions, they changed what lots of the arguments
2 were. I mean, they changed a sentence -- or moved a
3 comma, made it a period; remove these sentences and all
4 the other explanations. Those explanations are the ones
5 that talked about how Hiroya has electronic ticket
6 information that itself includes ticket invalidity data.

7 Ultimately, it doesn't have the use data.
8 And in fact, I think the last sentence on -- on the
9 current slide, 17, is super helpful. One of the
10 arguments in Hiroya was even that there would be no
11 motivation to include use data with the device of
12 Hiroya. So not only did it not have use data, there's
13 not even a motivation to -- to include it.

14 Based on that argument, we have what the
15 Court concluded in the Markman. The applicant
16 contrasted the invention with the electronic ticket
17 information of Hiroya which was validated by an
18 electronic signature, not use rules, and then goes on to
19 say this doesn't rise to level of definitive statements
20 or a clear and unmistakable disclaimer warranting
21 inputting their limitations.

22 Well, to now -- it didn't even -- Hiroya
23 didn't even have use status. To now say because of
24 something that was in it we can impute that anything
25 that mentions use status must have this new logically

1 separate -- that for some experts means a separate
2 partition, others means a separate file, others means
3 separate files that don't point to each other, it
4 just -- it can't be. It can't be something that's
5 argued before the Court -- I'm sorry -- before the jury.

6 So, ultimately, at the end of the day, I
7 think these questions basically expose the problems of
8 what the defendants are trying to do.

9 Does a logically separate limitation
10 apply to claims that recite only one memory?

11 Does it apply to claims that specifically
12 require the rules, the status data, and the content are
13 all in the some non-volatile memory?

14 And does the new logically separate
15 limitation apply to claims that don't mention any memory
16 and, instead, reference the single data carrier for any
17 rules and content, which Your Honor has already
18 construed against their disclaimer.

19 I'm really sorry for taking the Court's
20 time but...

21 THE COURT: All right. Response.

22 MS. FUKUDA: Your Honor, I only have
23 about nine slides, so this should be relatively quick.

24 So, Your Honor, I do want to address a
25 number of questions that Mr. Caldwell did raise here.

1 We fully recognize that Your Honor did go through claim
2 construction and found plain meaning for a number of
3 memory terms as well as for use status data and use
4 rules. We also recognize, Your Honor, that in your
5 report and recommendation, there was that citation to
6 the Becton Dickinson case. And I believe this shows up
7 on slide 10 of Mr. Caldwell's presentation.

8 Could we just look at that quickly?

9 No, this would be slide 10 of
10 Smartflash's. Here we go.

11 So --

12 THE COURT: Even the technology's tired.

13 COURTROOM DEPUTY: Which side are they
14 on?

15 THE COURT: Plaintiff's side.

16 MS. FUKUDA: So right before the sentence
17 that's been highlighted by Smartflash, you'll see that
18 the beginning of that paragraph says, Distinctly recited
19 limitations are usually interpreted as distinct
20 structures. And there's a cite to the Becton case, 616
21 F.3d at 1254.

22 Where a claim lists elements separately,
23 the clear implication of the claim language is that
24 those elements are distinct components of the patented
25 invention. Then Your Honor moves on to talk about how

1 the specification also discloses distinct memory
2 structures.

3 And so as we're applying the plain
4 meaning of these terms, both to memory and to use status
5 data and use rules, we went to our expert and said, In
6 view of the Court's construction, what does that mean?

7 Let's take the opinion as a whole. So a
8 couple of questions have popped up. One is under your
9 court's interpretation of plain meaning, can a person
10 refer to intrinsic evidence at all? So that was one
11 that -- and we looked at Federal Circuit precedents and
12 we came to the conclusion that the precedential opinions
13 all say that, yes, you can. You can look at the
14 intrinsic evidence.

15 Second question was -- given that Your
16 Honor has said -- has not found clear and unmistakable
17 disavowal -- can we still use the prosecution history to
18 inform what plain meaning is? And the question that --
19 and the answer we derived from Federal Circuit precedent
20 is also, yes, you can look at that.

21 So, let's turn back to our slides, and
22 I'd just like to quickly walk through a couple of those
23 cases.

24 THE COURT: But, I mean, not in a way
25 that conflicts with my construction, right? I mean,

1 what I've said is it doesn't have to be physically
2 separate. Is that what you're trying to argue?

3 MS. FUKUDA: No, we are not, Your Honor.
4 In fact, the one clarification that Your Honor -- report
5 and recommendation makes clear is that it cannot -- the
6 plain meaning cannot be physically separate memory. And
7 we are not arguing physically separate memory. In fact,
8 that -- that addresses some of Mr. Caldwell's questions.

9 He said, Look, you know, there are some
10 claims that refer to that one non-volatile memory that
11 stores both the use status data and the content. And
12 what we're saying is, yes, it can be one physical
13 memory, but within that one physical memory there needs
14 to be logical separations. Because of the very fact
15 that when Smartflash went to get the patent from the
16 Patent Office, they could have distinguished Hiroya on
17 other grounds, and he pointed to one ground under which
18 they distinguish Hiroya, but they chose to say that we
19 don't separately store -- I'm sorry -- that Hiroya does
20 not disclose separate storage of use status data from
21 content.

22 That was a distinction they made, and
23 that statement can't just be viciated by plain meaning.
24 Once you tell the Patent Office that there's a
25 distinction of your invention over prior art, that

1 sticks.

2 Now, it may not be clear and unmistakable
3 disavowal but it still informs claim construction. And
4 that's the Shier Developments case that just came out of
5 the Federal Circuit earlier this year.

6 THE COURT: And so what is your expert
7 opining is the distinction?

8 MS. FUKUDA: The distinction is that
9 we're no longer looking at whether it has to be two
10 separate chips or two separate -- actually physically
11 separate memories whether in a device or across two
12 different devices.

13 What the expert is saying is that
14 separate storage, when you read it in the context of the
15 intrinsic evidence here has to at least mean that
16 there's some logical separation. It is -- for example,
17 you could have one memory, one physical memory, and the
18 files are -- and content data is stored in one file and
19 use status data and use rules are stored in a separate
20 file. And those two files, you can access them
21 independently. They're not kind of merged together so
22 that in order to get to one file, you have to go through
23 the other one.

24 If they are logically separate from each
25 other, even if they're stored in the same physical

1 memory, that would meet the -- the statements that -- at
2 least that would be consistent with the statements that
3 were made to the Patent Office to distinguish over
4 Hiroya. And that's simply what we're trying to do here.

5 So, just so Your Honor understands, this
6 impacts from Apple's perspective nine out of the
7 asserted claims. So that -- just so we all know that
8 we're not wasting our time kind of chasing around some
9 esoteric argument.

10 So, can we quickly switch over... Thank
11 you very much.

12 So just very quickly, a couple of cases
13 just -- you know, again, we did struggle with this
14 concept, what is plain meaning, and the Seminole
15 Phillips case on claim construction says that you can't
16 just look at the ordinary meaning of the term in a
17 vacuum. You have to look at ordinary meaning in the
18 context of the written description and the prosecution
19 history.

20 Again, that concept has recently been
21 reiterated by the Federal Circuit in the Cardsoftt
22 versus Verifone case. Ordinary and customary meaning
23 must be evaluated in the context of the entire patent,
24 including the specification and the prosecution history.

25 And, you know, this is a motion that was

1 brought under O2 Micro. O2 Micro itself says that
2 ordinary and customary meaning are determined after
3 reviewing the intrinsic record. And why is that?
4 Because the public has access to prosecution history, to
5 the intrinsic record. They're entitled to rely on what
6 the public record says about what the claims cover and
7 what the claims don't cover whether or not they're under
8 a plain meaning interpretation.

9 So let's jump right -- this is a very
10 important case, Your Honor. We spent a bit of time in
11 our response that we filed on an expedited basis
12 yesterday. The Shire Development versus Watson
13 Pharmaceuticals case, 746 F.3d 1326, ironically has some
14 similarities beyond what we pointed out in our brief,
15 also dealt with the '720 patent and it dealt with the
16 issue of statements made during prosecution about two
17 things being separate.

18 The court in that case -- the district
19 court found that there was no clear disavowal. They
20 looked at the prosecution history and said it's not
21 clear and unmistakable, no disavowal. Went up to the
22 Federal Circuit and the Federal circuit says, We agree.
23 No clear disavowal. However, you are still entitled to
24 look at the prosecution history to inform your claim
25 construction. And in view of that prosecution history

1 statement about these two matrices being separate from
2 each other, the Federal Circuit said your claim
3 construction must reflect that these two matrices are
4 separate.

5 So a couple of highlighted sentences that
6 are key here in the first paragraph, Although the
7 prosecution history statements do not rise to the level
8 of unmistakable disavowal, they do inform the claim
9 construction.

10 And, Your Honor, that is our situation
11 over here. Here's a -- I believe you've seen this in
12 Smartflash's slides. We have it here as well. During
13 the prosecution of the '720 patent, not only did the
14 applicant make statements to distinguish over the Hiroya
15 prior art reference -- and that's on the bottom -- it
16 says, use status data stored on the non-volatile memory,
17 and then it says, to determine whether access to
18 separately-stored requested content.

19 All right. And then later on another
20 sentence, Hiroya does not disclose use status data
21 stored separately from associated content data. Not
22 only did they make that distinction in the Patent
23 Office, they also amended their claims. You'll see that
24 the original claims refer to data memory, and that was
25 amended to specify that it's non-volatile data memory

1 storing content memory.

2 And then the non-volatile parameter
3 memory was further defined later on in the elements to
4 distinguish the fact that in one you only -- you
5 store -- so there are two distinct memories right there,
6 a data memory for storing content, and then second part
7 is the parameter memory for storing use status data and
8 use rules.

9 So, these are two distinct elements of a
10 claim. Distinct elements in the claims are -- under
11 even Your Honor's report are supposed to be distinct
12 structures. And this is virtually identical to the
13 situation in Shire Development.

14 So, what we have on the left is our claim
15 at issue here, Smartflash's claim at issue here with the
16 statements that were made distinguishing Hiroya, and on
17 the right is the claim at issue in Shire Development
18 where the claim talks about an inner lipophilic matrix
19 and an outer hydrophilic matrix, and a claim
20 construction was provided by the district court that
21 didn't require them to be separate.

22 No disclaimer was found, and the Federal
23 Circuit pointed to the prosecution history that says --
24 I think it's Sanghvi was the prior art that was being
25 distinguished in that case. What the applicants there

1 told the Patent Office was that Sanghvi fails to
2 disclose a system containing two separate matrices.

3 And the court had found that because it
4 characterized the invention in terms of what the prior
5 art had failed to disclose and then didn't follow up
6 with a clear statement saying that we, on the other
7 hand, you know, we -- we do have these two separate
8 matrices. The court said there's no clear and
9 unmistakable disavowal; however, for this particular
10 purpose of claim construction, you have to be held to
11 your statement. That doesn't disappear into thin air.
12 That needs to be reflected in the claim construction,
13 and it was remanded back to the district court for that
14 to be reflected.

15 And so, Your Honor, the same exact thing
16 would happen here if Smartflash is not held to their
17 statements to the prosecution -- to the Patent Office.
18 What they would effectively be doing is to be allowed to
19 cross out claim language.

20 And, you know, on slide 7, we just drew
21 an illustration. That's what they would want the claim
22 to read, but it's not how the claims read.

23 Just very quickly, I believe that
24 Mr. Caldwell mentioned that there is an evolving set of
25 opinions from our experts. And to a certain extent it

1 was true, Dr. Ligler's deposition was taken, I believe,
2 within a week or two of Your Honor's report and
3 recommendation, and he had told Smartflash at the
4 beginning of his deposition that he was still
5 formulating and thinking through the impact of the
6 report and recommendation how that would affect his
7 opinions regarding the various memories and use status
8 data and use rules, but he was happy to share that with
9 Smartflash.

10 And in fact, Smartflash spent about two
11 hours asking him about it. So he gave those opinions at
12 the state that they were in at that point to give them
13 notice, and then also implied that, you know, when it's
14 all consolidated, that we will serve a supplemental
15 expert report that would put all his opinions together.
16 And we -- Your Honor, we in fact have done that.

17 Smartflash has not moved to strike that
18 particular report, instead we are here to discuss the
19 parameters of the claim construction meaning. So, you
20 know -- but the last thing to point out here is that
21 there's some insinuation that Dr. Ligler had changed an
22 important aspect of this -- this logically separate
23 opinions, and that's not true here.

24 The upper portion deals with his morning
25 testimony where he clearly said in response to a

1 question that if there are two different data base files
2 that don't intersect, they would be logically separate.
3 So there's no -- you don't have to -- you don't go
4 through one or the other. They're not linked together.
5 They can be separately accessed. They are logically
6 separate.

7 And in the afternoon, he gave the same
8 answer to the question, Are two distinct files logically
9 separate if one file references or links to the other?
10 And Dr. Ligler's answer was no.

11 All right. So two separate files, even
12 in the same memory, logically separate if they don't
13 intersect. If they do intersect, then they're not
14 logically separate.

15 And those are all the slides I have.
16 Does Your Honor have any further questions?

17 THE COURT: No.

18 Response.

19 MR. CALDWELL: I have a question and I
20 think it's a rhetorical one. How is that not claim
21 construction? We -- we just went through here's what
22 happened in Hiroya and all the distinctions. That was
23 not a distinct -- that was not a discussion of here's
24 how Apple's system operates; does this meet the word
25 that's in the claim. That was a claim construction

1 argument. That's not for the jury.

2 And I understand how late in the day it
3 is, I mean, but what's trying to -- what's happening is
4 I think the defendants are trying to win by basically
5 fatiguing you or us and something will slip through, or
6 there will be jury confusion. And we've seen it played
7 out and it's just terrible.

8 But Ms. -- Ms. Fukuda admitted, she says,
9 okay, it may not be clear and unmistakable disclaimer
10 what happened there. And what happened thereafter is
11 she says, well, so we went and looked for a case to say
12 that this is okay, what we want to do.

13 I saw the Shire case when they sent it to
14 us yesterday. I definitely encourage the court clerks
15 to read it, as if you don't have enough to read. The
16 Shire case, it's crystal clear. What it's saying --
17 even the sentence she likes, Although the prosecution
18 history statements do not rise to the level of
19 unmistakable disavowal, they do inform claim
20 construction.

21 It's not that your expert gets to come in
22 and just sort of waffle around about what the plain
23 meaning is. And what's interesting about Shires --
24 Shires, it says Shires is a lot like our case.

25 If I might trouble you for the document

1 camera, I would appreciate it.

2 Right after -- this is the sentence
3 that -- that Ms. Fukuda likes, and I think she pointed a
4 part of this next paragraph. She's making it sound
5 like, Oh, because of what they did in the file history
6 that did not rise to the level of disclaimer, the court
7 still said we have to go read this in as a limitation.

8 What the court actually says that in this
9 instance, you had the prosecution history, the structure
10 of the claim itself, the ordinary meaning of the claim
11 terms, including Markush group limitations that were
12 added in prosecution, and the patent's description of
13 the invention compel a claim construction which requires
14 the inner lipophilic matrix is separate from the outer
15 hydrophilic matrix. It goes on to say the patentee
16 admitted that those two require two separate matrices.

17 The logical reading of them requires
18 separation because they have mutually exclusive spatial
19 characteristics. One's inner, one's outer. They have
20 mutually exclusive compositional characteristics, one is
21 hydrophilic and one is lipophilic. And under the
22 ordinary and customary meanings of those
23 characteristics, it cannot be both the inner and outer,
24 nor can it be both hydrophilic and lipophilic. Plus,
25 was the prosecution important? You bet.

1 In prosecution, they added Markush groups
2 to the terms to say, you know that inner lipophilic one,
3 the inner lipophilic matrix is limited by a Markush
4 group consisting of unsaturated and/or hydrogenated
5 fatty acids, salts, esters thereof, fatty acid,
6 monoditriglycerides [sic], waxes, ceramides, cholesterol
7 derivatives, melting points below 90 degrees Celsius
8 whereas the outer hydrophilic matrix is similarly
9 limited by Markush group of stuff that hydrophilic. The
10 lack of overlap in these components supports the
11 requirement that they must be separate.

12 It is nothing like what we have here, not
13 to mention the fact that they just want to have their
14 expert come in and say, I've concluded there is a
15 disclaimer, makes it separate. I've concluded it has to
16 be logically separate.

17 In some instances, the guy Wechselberger
18 says, By the way, it can't be logically separated if the
19 things are not on separate partitions. In other words,
20 he basically says you have to take a block of your
21 memory of your hard drive and permanently reserve it,
22 permanently, for content -- or -- or for use rules.

23 And this is just stuff that's coming out
24 of nowhere. It has nothing to do with what happened
25 in -- in the Hiroya. But if it did, Ms. Fukuda's

1 argument made the point, it is claim construction. And
2 that can't be done in front of the jury.

3 You know with that I'll --

4 THE COURT: I agree with that, actually.
5 I mean, what I'm hearing is what I hear all the time as
6 we get close to trial, and it's a claim construction
7 issue that gets teed up as we get the case focused and
8 realize that there are some terms that got construed
9 initially and now we've got problems with that.

10 I just looked back over the claim
11 construction opinion where the focus -- it seems the
12 entirety of the argument from everyone was this
13 distinction of must it be physically separate or not.
14 We dealt with that.

15 But now what I'm hearing is a new
16 argument about whether it needs to be somehow separate,
17 and I haven't addressed. We haven't briefed it up. And
18 I think that you're right. I think that that's probably
19 a claim construction issue for the court, so I'm going
20 to give you an opportunity to brief it.

21 MR. CALDWELL: Unfortunately for the
22 Court, I'm sorry you have to take more briefing on it.
23 But what would the Court like in terms of -- in terms of
24 briefing on this? What would suit you?

25 THE COURT: Short would be great.

1 MR. CALDWELL: Zero, zero pages.

2 THE COURT: No pages. I -- I do want you
3 to brief it so that I can make an informed ruling on
4 claim construction and do it quickly because you-all are
5 now far along in the case. So my hope is that in the
6 next couple of weeks we can have the totality of the
7 briefing in.

8 Mr. -- do you-all have some thoughts on
9 that? I mean, it seems like everyone has kind of now
10 crystalized the issue, and I don't know that it should
11 be that hard to brief, but you give me your feedback on
12 that.

13 MR. CALDWELL: Well, from -- from our
14 perspective -- and I'm not going to reargue -- from our
15 perspective, you've basically found that since there is
16 an argument that there weren't use rules in the Hiroya
17 they were distinguishing, that makes it where there
18 can't be a clear and unmistakable disclaimer as to
19 something being separate because one of the arguments
20 was that predicate item wasn't there.

21 I think you've actually already addressed
22 it, I really do, but I'm not asking you to stand on that
23 and say don't -- don't brief it. But given the
24 situation that we're in, and we're getting ready for
25 trial and I feel like they are doing this improper

1 argument at this point, and I think what needs to happen
2 is if they think there's yet another limitation to read
3 in, the defendants together should file one brief on it,
4 I don't know, maybe seven pages or something like that,
5 and then respond five business days later or something
6 like that. I think they should go first in this --

7 THE COURT: Okay.

8 MR. CALDWELL: -- in this instance, and
9 then we get one response and that ought to be it.

10 THE COURT: I agree. It's going to be
11 short. And I may very well find that, yes, I've already
12 addressed it, but what I'm hearing is that maybe I
13 haven't addressed it fully enough.

14 So, Ms. Fukuda, what do you think about
15 that? How quickly could you have me something?

16 MS. FUKUDA: Give me one second.

17 THE COURT: Absolutely.

18 MS. FUKUDA: Your Honor, we propose that
19 we file our brief in one week, next Tuesday --

20 THE COURT: Okay.

21 MS. FUKUDA: -- and Smartflash can
22 respond to that a week from then.

23 THE COURT: On Tuesday the 16th,
24 Smartflash?

25 MR. CALDWELL: Ours would be -- ours

1 would be when, the 16th?

2 THE COURT: Tuesday the 16th. Sounds
3 pretty reasonable.

4 MR. CALDWELL: Yeah. I guess there's not
5 much -- many days that aren't super busy between now and
6 then, so...

7 THE COURT: That's right. And then we're
8 in Christmas. And who wants to be briefing on
9 Christmas, right? No.

10 MR. GARDNER: Your Honor, how many pages
11 do we have to write? How many pages, Your Honor, do you
12 want us to have? Can we have 10?

13 THE COURT: 10 pages. Everyone gets 10
14 pages. One opening, one response. That's it, 10 pages.

15 MR. GARDNER: Yes, Your Honor.

16 THE COURT: All right. Okay.

17 MR. CALDWELL: Thank you, Your Honor.

18 THE COURT: Now, we have only, you know,
19 20 minutes or so left and I want to talk about my stuff
20 before we continue, but let me just tell you this.
21 We -- we have not been able and we had a huge, you know,
22 workload to tackle and you-all have done a good job,
23 we've made a big dent in it, but we didn't get to any
24 summary judgment motions except the 101 motion.

25 So, I want to just throw this out there.

1 My schedule is very tight. I'm sure yours are, too, and
2 I'm sure you have flights and all of that. But if
3 you're willing and want to, I just want to offer you the
4 afternoon of Thursday of this week to come back and
5 argue some of this. You don't have to take it. I can
6 deal with this on the papers if you want.

7 MR. VERHOEVEN: We would very much
8 appreciate that. That's very generous of you, Your
9 Honor, and we would definitely be available and want to
10 do that.

11 THE COURT: Plaintiffs, how you doing?
12 And I understand if you need to consult calendars and
13 whatnot. I'm just looking -- that's really all I've got
14 availability-wise to give you.

15 MR. CALDWELL: Can I -- I think that at
16 several points throughout the day the defendants have
17 indicated to us they're willing to take several of them
18 on the papers.

19 So, can we just identify openly which
20 ones we're willing to take on the papers, because maybe
21 then it gets down to two people that need to come out
22 here and it makes it easier to --

23 THE COURT: Yeah. I think that's fair.

24 MR. VERHOEVEN: Well, Your Honor, if
25 you'll give us an opportunity to argue. We filed these

1 because we thought they were important, and we were
2 dealing with a time frame we had to try and get this.

3 Just for the record I'll point out, Your
4 Honor, Smartflash has used 103 minutes this afternoon
5 and we've used 70. We have three defendants. Game
6 Circus didn't get a chance to argue yet on their motion.

7 THE COURT: Yeah. That's really one of
8 my concerns is --

9 MR. VERHOEVEN: Yeah. And they want to,
10 I just checked with that -- with that party. So, you
11 know, I don't -- I know Your Honor doesn't like to do
12 clocks and set clocks and stuff, but we're kind of --
13 the disadvantage is because we have multiple defendants
14 and the time frame. So this would be very helpful to us
15 and it would be helpful to make sure Your Honor
16 understands our arguments, so we really would very much
17 like to take you up on that.

18 MR. CALDWELL: Well, I guess my point was
19 simply is there a way to streamline who has to come out
20 there. I understand I -- the time thing, I don't know
21 why we're getting into it. They dominated the morning,
22 we got more in the afternoon, so be it. We'll come
23 back. I was just wondering if it was possible that I
24 could maybe bring fewer than -- than all the folks
25 because I may be done with mine and do I need to take

1 over some. That's all.

2 Are there any that we can take up on the
3 briefs?

4 MR. VERHOEVEN: Well, we'll meet and
5 confer --

6 THE COURT: Yeah. That would be my
7 suggestion. What we'll do is we will resume this
8 hearing on Thursday at 2 o'clock. And so you'll have
9 basically from 2 to till 5 if you need it. Don't feel
10 like you have to take it. And -- and so y'all meet and
11 confer and see what you can get through in that -- in
12 that time. Okay?

13 MR. CALDWELL: Okay.

14 MR. VERHOEVEN: Yes, Your Honor.

15 THE COURT: Okay.

16 MR. VERHOEVEN: I have a discovery
17 related --

18 THE COURT: Well, good. I know you're
19 going to have to rearrange flights and all of that, so
20 thank you for doing that.

21 And then let me talk to you, then, about
22 the cases. So we're getting close, and without full
23 consent, we're going to need to draw a district judge,
24 and so I'm going to do that today. I'm going to have
25 the clerk's office draw your district judge.

1 I know that we have drawn a district
2 judge throughout this case for different things, for
3 dispositive motions, that kind of thing, and I think it
4 has been Judge Schneider each time. I want you to know
5 that -- that does not mean it will be Judge Schneider
6 for your trial judge.

7 I'm going to draw it, we'll see who we
8 get, and then I will meet with whoever it is and see
9 about getting you on his trial calendar. And so all
10 that to say that's up in the air. But I'm hopeful to
11 have -- well, you'll at least know which -- which
12 district judge you have by Thursday, and then we can
13 maybe talk about trial plans and all of that fun stuff.

14 I'm in -- I'm in receipt of all of your
15 notices regarding conflicts and all of that, too, which
16 I will put forward to whichever district judge that you
17 draw.

18 Okay. Are there any questions about
19 that?

20 MR. CALDWELL: No, Your Honor.

21 MR. VERHOEVEN: No, Your Honor. I --

22 MR. CALDWELL: What time on Thursday?
23 I'm sorry to --

24 THE COURT: 2 o'clock.

25 MR. VERHOEVEN: I just want to check with

1 counsel for Game Circus to make sure if Thursday would
2 work, too, because --

3 THE COURT: Yeah. Good idea.

4 MR. DUNWOODY: We're available Thursday.

5 MR. VERHOEVEN: I apologize, Counsel,
6 that we didn't get to your motion today.

7 THE COURT: All right. Well, then with
8 that note that we're going to resume this on Thursday at
9 2 o'clock, is there anything further that I can help you
10 with between now and then?

11 MS. BAILY: No, Your Honor.

12 MR. CALDWELL: Not from the plaintiff,
13 Your Honor.

14 THE COURT: Okay. I would encourage
15 you-all to meet and confer and see if you can't
16 streamline some of this, but I will see you-all on
17 Thursday.

18 (Hearing recessed.)
19
20
21
22
23
24
25

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.



December 31, 2014

JILL E. McFADDEN
Deputy Official Reporter
State of Texas No.: 3392
Expiration Date: 12/31/16

Jill E. McFadden, CSR